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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

MICHAEL R. MILKEN, LOWELL J. MILKEN, and PAMELA R. MONZERT,

Petitioners,

—v.—

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

I. In determining whether a judge's "impartiality might reasonably be questioned" by the public under 28 U.S.C. § 455(a), may a court refuse to assess an appearance of partiality from the "viewpoint of the reasonable person," and instead adopt the "purely legalistic perspective" of a sophisticated observer well-versed in financial and legal niceties?

II. Can a disqualifying appearance of judicial partiality be counterbalanced by admittedly unsubstantiated allegations that counsel have been over-zealous in the case or have somehow acted "adversely" to the judge's family interests?

III. Should the standard for mandamus review of a district court's denial of a recusal motion be far more exacting at the outset of litigation, when the disqualifying factors are discovered and the prospect of a tainted trial can be avoided, than the standard applied on direct appeal from a final judgment after trial, when the public's confidence in the judiciary may already have been damaged?

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners request this Court to issue a writ of certiorari to review a split decision of the United States Court of Appeals for the Second Circuit refusing to disqualify a trial judge whose wife received $30 million in a transaction financed by a defendant.

OPINIONS BELOW

The opinion of the Second Circuit denying mandamus and Judge Lumbard's dissent, reported at 861 F.2d 1307, 1317, are reprinted as Appendix A. The majority and minority opinions of the Second Circuit judges denying rehearing *en banc*, not yet reported, are reprinted as Appendix B. The unreported opinion

of the District Court for the Southern District of New York (Pollack, J.) denying recusal is reprinted as Appendix C.[1]

JURISDICTION

The decision of the Court of Appeals was entered on November 15, 1988. The petition for rehearing and suggestion for rehearing *en banc* was denied, over the dissent of four judges (Newman, Kearse, Pratt, Altimari), three months later on February 21, 1989. On March 7, 1989, the Second Circuit stayed issuance of its mandate pending disposition of this petition. (A51).[2] The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The principal statutory provision herein is 28 U.S.C. § 455(a), which provides as follows:

> Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

Title 28, section 455 of the United States Code is fully set forth as Appendix I.

STATEMENT OF THE CASE

In June 1988, Judge Pollack's wife and members of her family entered into a leveraged buyout transaction ("LBO") to sell their family business, Palais Royal, Inc. ("Palais Royal"), to Bain Venture Capital ("Bain"). (A6). The LBO was condi-

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1 The proceeding below is captioned *Securities and Exchange Commission v. Drexel Burnham Lambert Incorporated, The Drexel Burnham Lambert Group Incorporated, Michael R. Milken, Lowell J. Milken, Cary J. Maultasch, Pamela R. Monzert, Victor Posner, Steven N. Posner, and Pennsylvania Engineering Corporation*, No. 88 Civ. 6209 (MP) (S.D.N.Y.).

2 Citations to the separately paginated appendices will be styled "A_____."

tioned upon Bain's ability to obtain substantial financing; Bain was investing almost none of its own money. (A6). Bain sought out Drexel, a leading company in financing LBO's, to obtain the necessary high-yield financing. (A24). Drexel underwrote approximately $277 million in high-yield debt financing—the bulk of the purchase price. Drexel put up approximately $186.5 million of its own capital as a bridge loan because only $90.5 million of the debt had been placed at the time of the closing. (A41). Drexel also acquired an 8.5% interest in Mrs. Pollack's family business. (A41).

As a result of Drexel's efforts, Mrs. Pollack received $30 million; other members of her family received $55 million.

On September 7, 1988—at a time when Drexel was already committed to the Palais Royal LBO—the SEC filed an action against Drexel, petitioners (who are all Drexel employees) and others, in the Southern District of New York. (A8). Two days later, defense counsel first discovered that Judge Pollack's wife had a stake in the Drexel-financed LBO. (A8). Defense counsel immediately notified Judge Pollack and the SEC. (A9).

Judge Pollack, who said the news "hit [him] like a ton of bricks," nevertheless felt that the suggestion that he recuse himself was a personal insult and an attack on his professional integrity. (A74, A76). He reacted angrily, calling the notion of a conflict of interest a "cockamamie story," challenging imaginary "improprieties" by counsel, and threatening to impose sanctions on counsel if they moved for recusal. (A75, A76, A79). Insisting that the record be sealed, Judge Pollack declared:

> "I can tell you right now you can forget the issue of recusal and that is one that I would write a very strong opinion about under the circumstances." (A81).
>
> * * *
>
> "I have taken the case and I don't intend to give it up except for some impropriety on my part which I do not visualize exists in this matter." (A82).
>
> * * *

> "If you fellows had put that in an affidavit and come up on a Rule 11, you would have gotten whacked." (A79).
>
> * * *
>
> "I intend to exercise whatever rights I have to sanction anybody who on the basis of insufficient information and failure to investigate and concealment of anything that might or should have been said." (A81).

In short, at the very outset, before all the facts were even known, Judge Pollack prejudged the recusal issue and sought to intimidate counsel into not making the motion. Even after the recusal motion was made under seal on September 20, 1988, Judge Pollack continued to enter sweeping orders in this case regarding case management and discovery—until his activities were stayed, *sua sponte*, by the Second Circuit. (A52-53).

On October 17, Judge Pollack issued an opinion denying the recusal motion, which he labelled "ludicrous," "far-fetched," "bizarre" and an "illusory diversion." (A47, A49, A50). Because Judge Pollack's wife was to receive a $30 million check from Bain, and not directly from Drexel, Judge Pollack reasoned that "[h]ers is not a Drexel-financed transaction." (A46). Judge Pollack concluded that his wife was not in "privity" with Drexel and thus there was "no reasonable basis for doubting the Court's impartiality." (A46-47).

Judge Pollack not only denied the recusal motion; he also launched an attack on the personal integrity of the lawyers who made the motion. On October 10 (Columbus Day), Judge Pollack, acting *sua sponte*, issued an order to show cause accusing one law firm, Paul, Weiss, Rifkind, Wharton & Garrison ("Paul, Weiss"), of having a "conflicting" representation with respect to his wife's family business and of acting "*adversely*" to his family's interests in seeking his removal from the case. (A54-55).

Judge Pollack based his accusations of conflict on the fact that Paul, Weiss had previously rendered tax advice to two Palais Royal shareholders who were members of Judge Pollack's family—well before Bain had approached Drexel to

finance the transaction. In support of his accusations, Judge Pollack assembled a series of "documents from his family's files," (A26) (Lumbard, J., dissenting), that he had collected extrajudicially and marshalled as "evidence" on behalf of what he perceived to be his family's financial interests. (A56-69).

Based on this "evidence," Judge Pollack ordered that two Paul, Weiss partners show cause the following morning why the recusal motion should not be "withdraw[n]." (A55). When the attorneys appeared in open court to show cause, Judge Pollack permitted no argument, summarily referring the matter to the Chief Judge of the Southern District of New York for "disciplinary resolution, if required." (A71). The Judge thus made himself a complaining party against counsel for one of the principal defendants on an issue unrelated to counsel's conduct in the lawsuit before him.

This extraordinary state of affairs has attracted widespread public interest and press coverage and sharply polarized the members of the Second Circuit. On November 15, 1988, a panel of the Second Circuit issued a 2-1 decision denying the mandamus petition. Judge Cardamone (joined by Judge Pierce) held that a writ of mandamus disqualifying Judge Pollack could issue only if "Judge Pollack can 'indisputably' be said to have abused his discretion in denying the motion to recuse himself." (A11-12). Explaining its standard for judicial disqualification, the panel majority wrote:

> We disagree with our dissenting colleague's statement that recusal based on an appearance of impropriety under § 455(a) 'requires us to judge the situation from the viewpoint of the reasonable person, and not from a purely legalistic perspective.'

(A14).

Applying its "purely legalistic" test, the panel majority found dispositive the absence of technical "privity" between Mrs. Pollack and Drexel, emphasizing that Drexel was retained by Bain, not by Mrs. Pollack's company; that Drexel was not "indispensable" to the transaction; that Mrs. Pollack "has had

no business or other dealings with Drexel''; and that Mrs. Pollack ''will receive no money from Drexel.'' (A17). Glossing over the undisputed fact that Mrs. Pollack was to receive a $30 million check drawn on funds Drexel raised specifically to finance Mrs. Pollack's transaction, the panel majority concluded that this ''connection is too remote to mandate recusal.'' (A17). The majority apparently believed that the public's perception of partiality would be influenced by whether Drexel's $30 million check was drawn to the order of Mrs. Pollack or drawn to the order of Bain and then endorsed to Mrs. Pollack. Finally, the majority ruled that in determining whether a judge's ''impartiality might reasonably be questioned,'' a court must weigh admittedly unsubstantiated charges that a party intentionally created a conflict and that defense counsel engaged in judge shopping—because ''a reasonable observer would want to know.'' (A20).

Judge Lumbard, in a vigorous dissent, disagreed with the majority's stringent standard of mandamus review, explaining that appellate review of a judge's failure to recuse himself must not be confined to ''abuse of discretion''; rather, the appellate court ''must query whether the trial judge could exercise that discretion in the face of a 'personal, extrajudicial bias which precludes dispassionate judgment.' '' (A32). Moreover, Judge Lumbard declared that ''to impute a lack of privity is to exalt the form of the transaction over its substance, and to ignore the reasonableness standard of § 455(a), which requires us to judge the situation from the viewpoint of the reasonable person, and not from a purely legalistic perspective.'' (A27-28). Judge Lumbard reasoned that the lack of technical privity ''can fool no one'' regarding the ''inescapable relevant fact'' that ''Mrs. Pollack will not get $30 million but for Drexel.'' (A23, A27). He added: ''It is largely because of Drexel's efforts that Mrs. Pollack will receive $30 million. That is the common sense of it; and it is the public perception that Mrs. Pollack is to be paid $30 million thanks to Drexel.'' (A28).

Moreover, according to Judge Lumbard, Judge Pollack ''cannot act impartially in these cases'' because of his intemperate reaction to the recusal motion, which Judge Pollack stated

was "adverse" to his family's interests—"as if his continued participation in this litigation would be favorable to those family interests." (A27). Judge Lumbard concluded that "we must act to avoid compounding the harm already done to the public's perception of the integrity of the judiciary." (A32).

On February 21, 1989, after three months of deliberations, the Second Circuit denied the petition for rehearing and suggestion for rehearing *en banc*, although four judges (Newman, Kearse, Pratt, Altimari) took the unusual step of issuing an opinion dissenting from the denial of rehearing *en banc*. Judge Newman, writing for the dissenters, declared that "[t]hese are extraordinary circumstances, raising profound questions as to the standards for recusal and the role of this Court in maintaining the highest standards of judicial propriety in [the Second] Circuit." (A42). Judge Newman, not impressed by the privity theory, believed that rehearing was essential given the "flow of substantial sums of money from Drexel, the litigant before the District Judge, to the Judge's wife." (A41).

Judge Newman also concluded that mandamus was required because Judge Pollack's attacks against defense counsel "place[d] the Judge in the role of adversary, on behalf of his wife, to counsel now appearing in the litigation before the Judge." (A41). Judge Newman explained that "the present situation involves the District Judge, not solely as a presiding judicial officer, but as the husband of a principal victim of the attorneys' alleged ethical violation." (A42).

In these circumstances, Judge Newman concluded that the effect of the majority's decision to deny mandamus relief not on the merits, but under a concededly daunting standard of review, is to place this "important litigation" under "a cloud." (A42).

Four other Second Circuit judges (Meskill, Pierce, Cardamone and Miner), brushing aside the appearance of judicial partiality, concurred in the court's denial of rehearing but found that Judge Pollack's attacks on counsel came "perilously close" to the borderline for recusal. (A36). Those judges, like the panel majority, relied on the technical "privity" theory and

concluded that the " 'flow of substantial sums' to Mrs. Pollack" were "much too indirect and circuitous a movement to lead reasonable, objective and impartial observers" to be concerned about an appearance of partiality. (A39).

Recent developments, which occurred during the three months the Second Circuit was debating rehearing and which were noted by Judge Newman (A43), make the appearance of partiality in this case—and the threat to the public's confidence in the integrity of the federal judiciary—even more startling. Drexel has agreed in principle with the United States Attorney for the Southern District of New York to plead guilty to certain criminal charges and to fire petitioner Michael Milken, and is now engaged in negotiations with the SEC to settle the SEC's lawsuit against Drexel pending before Judge Pollack.

If Drexel settles and cooperates in governmental investigations of petitioners—who will remain defendants in the SEC civil action—Drexel, which raised $30 million for the wife of the presiding trial court judge, will be in a position potentially adverse to petitioners. But whether Drexel settles or not, it is difficult to imagine a more glaring case where a judge's "impartiality might reasonably be questioned" by members of the public.

REASONS FOR GRANTING THE WRIT

The combined impact of the Second Circuit's erroneous legal theories—its contempt for the perceptions of average members of the public, its weighing of extraneous factors to offset an appearance of partiality, and its illogical standard of mandamus review that discourages the resolution of recusal motions at the outset of litigation—undermines public confidence in the judiciary. This Court should review these unprecedented and mischievous theories, which erode the important congressional policies animating section 455(a) and clash with this Court's opinion in *Liljeberg* and the decisions of several other Circuits.

I.

THE SECOND CIRCUIT'S DECISION GUTS SECTION 455(a) AND CONFLICTS WITH *LILJEBERG* AND DECISIONS OF OTHER CIRCUIT COURTS.

A. The Second Circuit's Decision Eviscerates Section 455(a).

Section 455(a) provides that a judge "shall disqualify himself in any proceeding in which his impartiality *might* reasonably be questioned" (emphasis added). "The general language of [section 455(a)] was designed to promote public confidence in the integrity of judicial process by replacing the subjective 'in his opinion' standard with an objective test." *Liljeberg* v. *Health Services Acquisition Corp.*, 108 S. Ct. 2194, 2201 n.7, 2202 (1988).[3] While the panel majority pays lip service to the objective recusal standard, the decision actually reflects a return in the direction of the subjective recusal standard that Congress repealed in 1974.

(1) The Second Circuit Embraces a "Purely Legalistic Perspective," Not a Common-Sense Approach, in Deciding Section 455(a) Motions.

The majority, as Judge Lumbard points out, expressly rejects the need to consider the perspective of the average "person in the street," and instead focuses on the perceptions of a supersophisticated person who is presumed to know and understand all financial and legal nuances—including the hoary doctrine of contractual privity. Thus, the majority asserts:

> We disagree with our dissenting colleague's statement that recusal based on an appearance of impropriety under § 455(a) 'requires us to judge the situation from the view-

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3 *Cf. Commonwealth Coatings Corp.* v. *Continental Casualty Co.*, 393 U.S. 145 (1968) (invalidating an arbitration award by applying a strict appearance-of-partiality standard).

> point of the reasonable person, and not from a purely legalistic perspective.'

(A14).

Judge Lumbard, in contrast, takes a common-sense approach in harmony with the goal of section 455(a)—"to promote public confidence in the integrity of the judicial process." *Liljeberg*, 108 S. Ct. at 2202. He observes that legalistic arguments based on privity "exalt the form of the transaction over its substance" and "can fool no one regarding who is responsible for raising the money and causing it to get to Mrs. Pollack." (A27). To Judge Lumbard, the "inescapable relevant fact" is that "Mrs. Pollack will not get $30 million but for Drexel." (A23, A27). Judge Lumbard concludes, "[i]t is clear to me that a reasonable person knowing these ultimate conceded facts would reasonably question Judge Pollack's ability to supervise such litigation impartially." (A23).

Judged from the viewpoint of either the scholar or the average "person in the street," recusal is clearly warranted here. But beyond the particular facts of this case, the Second Circuit's decision leads to pernicious consequences that are antithetical to the congressional objective in enacting section 455(a). By eschewing the perspective of the average person applying common sense in favor of a sophisticated observer supposedly guided but actually distracted by legal technicalities about privity, the majority opinion all but eliminates the public "appearance" portion of the "appearance of impartiality" standard, leaving a technical and legalistic standard that fails to promote public confidence in the integrity of the federal courts. The issue here is not privity, but the appearance of partiality.

(2) The Second Circuit's Decision Relies on Extraneous Factors Hostile to the Purposes of Section 455(a).

Under section 455(a), the *only* issue is whether a judge's "impartiality *might* reasonably be questioned." Nevertheless,

the majority ruled that in making such an inquiry it is also appropriate to consider other issues—such as allegations of attorney misconduct, improper charges of forum shopping, rank speculation that a party deliberately created the conflict, and a district judge's purported investment of time in a litigation. (A18-20). Remarkably, the panel majority concedes that the SEC's allegations of judge-shopping and suggestion that Drexel intentionally created the grounds for recusal "are not established facts upon which decision may rest" (A18, A20), but nevertheless concludes that "a reasonable observer would want to know" about these unsupported charges. (A20).[4] In his opinion concurring in the denial of *en banc* review, Judge Pierce (joined by Judges Meskill, Cardamone and Miner) again stresses the need to weigh against the appearance of judicial partiality unproven allegations of judge-shopping and the deliberate creation of a conflict. (A35).

Under the majority's startling theory, charges of overzealousness by defense counsel must somehow be balanced against the appearance of judicial bias, with courts left to guess whom the public would blame more. That makes no sense. A public perception of partiality cannot be undone by innuendoes of attorney misconduct. One issue has nothing to do with the other. Converting disqualification motions into contests in which a tribunal weighs the court's partiality against counsel's alleged misbehavior—an illogical exercise at best—will surely diminish an already skeptical public's respect for the integrity of the judicial system.

(3) The Panel Majority Opinion Undermines This Court's Holding in *Liljeberg*.

The majority's repudiation of the average "person-in-the-street" standard, and its invention of a "good guy, bad guy"

4 Judge Lumbard correctly points out in dissent that "[t]here is absolutely no evidence that Drexel agreed to act for Bain in order to manufacture a situation in which Judge Pollack's continued participation in ongoing litigation could be challenged." (A23). The majority does not dispute this; indeed, it concedes that such charges are unsubstantiated. (A18, A20, A35).

balancing act, are completely at odds with this Court's landmark decision in *Liljeberg*.

The facts of *Liljeberg* are, briefly, as follows:

The trial judge was a trustee of Loyola University. Loyola had contracted to sell real estate to Liljeberg, who had obtained a "certificate of need" from Louisiana to construct a hospital on the site. This was a favorable transaction for Loyola. A lawsuit arose when a third party ("HSAC") claimed it was entitled to Liljeberg's certificate. The trial judge, sitting without a jury, ruled in favor of Liljeberg. The Fifth Circuit affirmed.

Ten months later, after learning that the trial judge was a Loyola trustee, HSAC moved to vacate the judgment on the ground that the judge was disqualified under section 455(a). This Court accepted the Fifth Circuit's conclusion that, during the trial, the judge had forgotten about Loyola's interest in the litigation, although he had previously been informed of this fact. Nonetheless, this Court, quoting the Fifth Circuit, declared that " '[i]f it would appear to a reasonable person that a judge has knowledge of facts that would give him an interest in the litigation[,] then an appearance of partiality is created *even though no actual partiality exists*. . . .' " *Id.* at 2202 (emphasis added).

If *Liljeberg* presented what this Court described a "plain" case for recusal, *id.* at 2203, then the facts here spell out an even plainer case. After all, the trial judge in *Liljeberg*, who forgot about Loyola's interest in the lawsuit, did not stand to gain a penny from the transaction—he was merely a trustee of a university that stood to profit. Here, Judge Pollack is well aware of the $30 million payment to his wife due to Drexel's efforts. (A29). In *Liljeberg*, the disqualifying facts were raised *after* a final judgment and an appellate affirmance. In contrast, Judge Pollack became aware of his wife's multi-million dollar stake in the Drexel-financed LBO within two days after the SEC filed its complaint.

More important, the rationale of the Second Circuit panel undermines the teaching of *Liljeberg* and sets a dangerous precedent that conflicts with decisions of other Circuits. If this Court had focused on extraneous factors such as judicial efficiency, or applied the Second Circuit's "purely legalistic perspective," it would have reached the opposite result in *Liljeberg*. There, this Court vacated a final judgment—years after the Circuit Court had affirmed the judgment—even though there had been an enormous investment of judicial resources; here, petitioners move for recusal at the outset of litigation. In *Liljeberg*, this Court found an appearance of partiality because the public "might" reasonably have concluded—*contrary to fact*—that the trial judge knew about the Loyola conflict when he rendered his decision. But the Second Circuit's reasoning here "assumes" that the hypothetical observer "knows and understands all the relevant facts" (A13)—including the fact that the *Liljeberg* trial judge had forgotten about his interest in the litigation. Thus, the Second Circuit's savant blinded by legal technicalities—unlike this Court's "reasonable" person in the street—would have concluded that there was no appearance of partiality in *Liljeberg*.

In short, the standard for judicial disqualification under the statute—and under *Liljeberg*—looks only to *public appearances*. The Second Circuit simply ignores this basic point.

B. The Second Circuit Decision Conflicts With the Decisions of Other Circuit Courts.

The Fifth and Eleventh Circuits have recently issued recusal decisions, applying section 455(a) and *Liljeberg*, that directly conflict with the Second Circuit opinion here.

In *In re Faulkner*, 856 F.2d 716 (5th Cir. 1988), the Fifth Circuit held that despite "the total absence of any showing of actual bias," *id.* at 721, the trial judge was disqualified under section 455(a). The Fifth Circuit—in direct conflict with the Second Circuit—declared that *Liljeberg* "reiterated that the

view of the *average*, reasonable person is the standard for analysis as to whether a judge shall disqualify himself or herself." *Id.* at 720 (emphasis added). The Fifth Circuit added:

> Significantly, the [*Liljeberg*] Court suggests that *although the view of the 'reasonable person' may not always be fair or even accurate, it is still the standard that must be applied*: '[P]eople who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges. The very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible.' [*Liljeberg*] at 2204-05.

Id. at 721 (emphasis added). Similarly, in *Parker* v. *Connors Steel Co.*, 855 F.2d 1510 (11th Cir. 1988), the Eleventh Circuit relied on *Liljeberg* in holding that section 455(a) "embodies an objective standard" and focuses on the "*disinterested lay observer.*" *Id.* (emphasis added).

Few things are more important than preserving the foundations of public confidence in the basic institutions of government. This case, which has proceeded under the spotlight of the press, the financial community, and the public at large, provides the ideal vehicle for this Court to assure the public that the federal courts maintain the strictest standards of judicial integrity, and to resolve a conflict in the Circuits concerning the application of section 455(a).

II.

THE SECOND CIRCUIT'S DECISION CREATES AN ILLOGICAL STANDARD FOR MANDAMUS REVIEW OF DISTRICT COURT DENIALS OF RECUSAL MOTIONS THAT CONFLICTS WITH DECISIONS OF OTHER CIRCUITS.

A. The Second Circuit's Standard of Mandamus Review Creates an Illogical Rule of Law and Trivializes *Liljeberg*.

The majority bases its opinion on an incorrect and unworkable standard for mandamus review of recusal motions, which undermines the purposes of section 455(a) and conflicts with decisions in other Circuits and the rationale of *Liljeberg*.

The majority confines mandamus review of a denial of a recusal motion to those instances where an "extraordinary showing" can be made that "the district court indisputably abused its discretion." (A11, A15). The majority opinion concedes that its daunting standard of mandamus review for recusal motions is far higher than the standard on plenary appeal after trial and judgment. (A15). Judge Pierce's concurring opinion denying rehearing likewise emphasizes that the standard of review varies depending on the "procedural" point at which recusal is requested: "the applicable standard of review [on a direct appeal] would no longer require Drexel to show that it had a 'clear and indisputable' right to relief, the standard which is applicable to petitions for writs of mandamus. . . ." (A37).

Judge Lumbard, in his dissent, rejects the panel majority's view, stating that the standard of review of a judge's refusal to recuse himself is *not* an "abuse of discretion" standard. "Rather, we must query whether the trial judge could exercise that discretion in the face of a 'personal, extrajudicial bias which precludes dispassionate judgment.' " (A32) (quoting *In re IBM*, 618 F.2d 923, 926 (2d Cir. 1980)).

Judge Lumbard's standard of review makes good sense. Three appellate court judges removed from the "rough and

tumble'' of district court proceedings are in a far better position than the trial judge to gauge the likely public perception of the district judge's impartiality. In addition, certain judges, like the district judge here, may regard a recusal motion as some sort of professional insult and thus may be unable to evaluate the merits of the motion in an entirely objective and dispassionate manner. In such cases, as here, appellate court deference to a district court's denial of a recusal motion is particularly inappropriate.

The Second Circuit's standard of mandamus review, moreover, is at odds with the rationale of this Court's decision in *Liljeberg*. The panel majority attempts to take *Liljeberg*'s stringent standard for judicial disqualification out of play by theorizing that it ''is inapposite by reason of its procedural circumstances.'' (A15). The majority states:

> In *Liljeberg*, the Court of Appeals was not faced with, as here, a petition for a writ of mandamus, but rather was presented with an ordinary appeal. . . . This clearly differentiates the standard of review applied in *Liljeberg* from that used in reviewing Judge Pollack's denial of Drexel's recusal motion.

(A15). But the very point of section 455(a), reaffirmed by this Court in *Liljeberg*, is that the systemic imperative of maintaining public confidence in the judicial process demands that the rigorous standards governing judicial integrity under section 455(a) be scrupulously honored and not depend on fortuitous procedural circumstances—such as when a party discovers facts warranting a judge's disqualification. Breaches of judicial ethics should not be papered over at the beginning of a litigation only to be confronted at the end.

Furthermore, the majority's single-minded focus on the ''extraordinary'' nature of mandamus relief utterly obscures the even more ''extraordinary'' procedural circumstances that confronted this Court in *Liljeberg*. As noted above, the disqualifying facts in *Liljeberg* were first raised ten months *after* a final judgment had been affirmed by the Court of Appeals. This Court nevertheless concluded that the interest in maintaining

"the public's confidence in the judicial process" is of such transcendent significance as to constitute an "extraordinary circumstance" sufficient to overcome the policy in favor of the finality of judgments embodied in Fed. R. Civ. P. 60(b)(6). 108 S. Ct. at 2204.

For the following additional reasons, the standard of mandamus review adopted by the Second Circuit is illogical, inefficient, and will further undermine public confidence in the judiciary.

First, the panel majority's lopsided procedural framework discourages the prompt resolution of disqualification issues at the threshold of litigation and encourages parties to defer review until after entry of final judgment, at which time they will know the result on the merits and can decide whether they wish to upset it. This incentive to sandbag recusal motions frustrates this Court's command in *Liljeberg* that litigants must "promptly disclose" those facts that might necessitate a judge's recusal. 108 S. Ct. at 2206.[5]

Second, applying an artificially stringent standard of review for recusal motions in mandamus proceedings will result in the unnecessary expenditure of considerable judicial and private resources in connection with a trial that will be a nullity if overturned on appeal under a normal standard of review.

Third, the majority's stringent mandamus standard creates a perverse incentive for a judge who narrowly escaped mandamus to later rule on the merits for the party who could make the most forceful recusal argument on appeal. A trial judge, in an effort to avert accusations of favoritism, might, as Judge New-

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5 *See also Satterfield* v. *Edenton-Chowan Bd. of Ed.*, 530 F.2d 567, 574-75 (4th Cir. 1975) (holding that the grounds warranting recusal must be disclosed promptly); *Health Services Acquisition Corp.* v. *Liljeberg*, 796 F.2d 796, 802 (5th Cir. 1986) (same), *aff'd*, 108 S. Ct. 2194 (1988); *In re City of Detroit*, 828 F.2d 1160, 1167-68 (6th Cir. 1987) (same); *United States* v. *Patrick*, 542 F.2d 381, 390 (7th Cir. 1976) (same), *cert. denied*, 430 U.S. 931 (1977); *Phillips* v. *Amoco Oil Co.*, 799 F.2d 1464, 1472 (11th Cir. 1986) (same), *cert. denied*, 481 U.S. 1016 (1987).

man suggested, "bend over backward to rule against the litigant [he was soon to be accused of favoring] on close questions in order to demonstrate impartiality." (A43). The public, as a result, would be led to view recusal proceedings not as a vital mechanism designed to promote public confidence in an impartial judiciary, but merely as a tactic in a perpetual game of deceptive propriety played by everyone—including judges.

Fourth, as Judge Newman observed, where, as here, a district judge denies a recusal motion and the court of appeals denies mandamus not on the merits but because of a very strict standard of review, the litigation continues under "a cloud." (A42). That cloud, moreover, will never fully dissipate. The institutional taint created by a district judge's refusal to step aside in the face of a substantial recusal motion, absent immediate consideration on the merits by the appellate court, is indelible and cannot be erased from the public mind even by a subsequent appellate affirmance. Any judgment rendered in these circumstances can be dismissed by one side or the other as the result of either judicial partiality or an undue desire to avoid the appearance of judicial partiality.

Fifth, a post-judgment ruling that a trial before a tainted judge should never have occurred in the first place independently erodes public confidence in the judicial process. As Justice (then Judge) Scalia pointed out in dissent in *Richardson* v. *United States*, 702 F.2d 1079, 1086 (D.C. Cir. 1983), *rev'd*, 468 U.S. 317 (1984), public confidence in the judicial process is harmed not only from the fact of a trial that never should have been held in the first place, but also from the public spectacle of vacating the result of such a trial for reasons unrelated to the merits.

B. The Second Circuit's Standard of Mandamus Review Conflicts With The Standard Applied by Other Circuits.

The daunting standard of mandamus review adopted by the Second Circuit (an "extraordinary showing" of an "indisputable abuse of discretion") is in direct conflict with the far more reasonable standard (mere "error") applied by the Courts of

Appeals for the Fourth, Fifth, and Seventh Circuits. This Court has never addressed the standard governing mandamus review of a district court's denial of a recusal motion.

As Judge Posner explained for the Seventh Circuit Court of Appeals in *Union Carbide Corp.* v. *United States Cutting Service, Inc.*, 782 F.2d 710, 712-13 (7th Cir. 1986):

> A judge's refusal to recuse himself in the face of a substantial challenge casts a shadow not only over the individual litigation but over the integrity of the federal judicial process as a whole. The shadow should be dispelled at the earliest possible opportunity by an authoritative judgment either upholding or rejecting the challenge.
>
> * * *
>
> [W]here a serious [recusal] question is raised, we shall interpret generously our power to issue the writ [of mandamus], in order that we may lay the question to rest at the earliest possible time.

See also United States v. *Balistrieri*, 779 F.2d 1191, 1204-05 (7th Cir. 1985).

Likewise, the Fourth and Fifth Circuits have applied a less stringent standard of mandamus review of district court denials of recusal motions, and thus are in direct conflict with the Second Circuit. *See In re Rodgers*, 537 F.2d 1196, 1197 (4th Cir. 1976) (granting mandamus where the district judge "erred" when he declined to recuse himself from presiding over a criminal trial);[6] *In re Faulkner*, 856 F.2d 716, 720 (5th Cir. 1988) (granting mandamus where the district court "erroneously" failed to recuse himself).

The important public policy considerations underlying recusal motions demand that standards of review facilitate prompt

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6 *See also In re Va. Elec. & Power Co.*, 539 F.2d 357, 365 (4th Cir. 1976) ("In recent years, however, federal courts, with the Supreme Court's approval, have come to appreciate the usefulness and flexibility of mandamus in other, less extreme, situations. In particular, mandamus has emerged as an appropriate remedy in the supervision of district courts by the various courts of appeals."); *cf. LaBuy* v. *Howes Leather Co.*, 352 U.S. 249 (1957).

resolution, and that the standard of review *not* be more onerous at the outset of a litigation than after trial. The standard of review should not vary among the Circuits, for that in itself erodes the public's confidence in the integrity of the Nation's judiciary. Certiorari is necessary so this Court, which has never addressed this issue, can establish uniform standards to govern mandamus review of a district court's denial of a recusal motion and resolve the present conflict among the Circuits.

CONCLUSION

As Judge Lumbard wrote:

> A central pillar of our government is the people's confidence that our courts are free of bias or favor and are administered by judges who are unquestionably impartial. Whenever any reasonable basis to doubt a judge's impartiality exists, this public trust demands that we act swiftly and decisively.

(A32).

For the reasons stated above, a writ of certiorari should be granted.

Dated: April 5, 1989

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 578—August Term 1988

(Argued October 31, 1988 Decided November 15, 1988)

Docket No. 88-3060

IN RE: DREXEL BURNHAM LAMBERT INCORPORATED, DREXEL BURNHAM LAMBERT GROUP INCORPORATED, MICHAEL R. MILKEN, LOWELL J. MILKEN, CARY J. MAULTASCH, and PAMELA R. MONZERT,

Petitioners.

IN RE: IVAN F. BOESKY SECURITIES LITIGATION,

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

—v.—

DREXEL BURNHAM LAMBERT INCORPORATED, DREXEL BURNHAM LAMBERT GROUP INCORPORATED, MICHAEL R. MILKEN, LOWELL J. MILKEN, CARY J. MAULTASCH, and PAMELA MONZERT,

Defendants.

Before:

LUMBARD, CARDAMONE and PIERCE,
Circuit Judges

A petition for a writ of mandamus has been filed by Drexel Burnham Lambert Incorporated, *et al.* seeking the recusal under 28 U.S.C. § 455 of Senior United States District Court Judge Milton Pollack on the grounds that he is disqualified from presiding over pending civil fraud actions, which name petitioners as defendants. The underlying actions against petitioners were instituted by the Securities and Exchange Commission on September 7, 1988, and earlier by individual and class action plaintiffs. Plaintiffs filed opposition papers to the issuance of the writ.

The petition for a writ of mandamus is denied. Judge Lumbard dissents and votes to grant the writ in a separate opinion.

PETER FLEMING, JR., New York, New York (Eliot Lauer, Mark H. O'Donoghue; Curtis, Mallet-Prevost, Colt & Mosle, New York, New York, of counsel), *for Defendants Drexel Burnham Lambert Incorporated and Drexel Burnham Lambert Group, Inc.*

ARTHUR LIMAN, New York, New York (Martin Flumenbaum; Paul, Weiss, Rifkind,

Wharton & Garrison, New York, New York, of counsel), *for Defendant Michael R. Milken.*

PAUL GONSON, Washington, D.C., (Thomas C. Newkirk, Securities and Exchange Commission, Washington, D.C., of counsel), *for Respondent Securities and Exchange Commission.*

GEORGE REYCRAFT, New York, New York (Richard J. Wiener, Pamela Rogers Chepiga, Debra L. Brown; Cadwalader, Wickersham & Taft, New York, New York, of counsel), *for* Arden Way *Plaintiffs.*

DAVID BERGER, Philadelphia, Pennsylvania (Berger & Montague, P.C., Philadelphia, Pennsylvania, of counsel), *for Class Plaintiffs in* In re Boesky Securities Litigation.

CARDAMONE, *Circuit Judge*

A petition for a writ of mandamus has been presented seeking the disqualification of Senior United States District Court Judge Milton Pollack from presiding over certain civil fraud actions arising from claims of illegal insider trading. One action has been instituted by the plaintiff Securities and Exchange Commission (SEC or Commission) against the present petitioners, defendants Drexel Burnham Lambert Incorporated, Drexel Burnham Group Incorporated, Michael R. Milken, Lowell J. Milken, Cary J. Maultasch, and Pamela R. Monzert

(Drexel). The other action is an amalgam of similar consolidated civil fraud actions instituted by individual plaintiffs that include the Drexel corporations as named defendants. Plaintiffs in both of these pending civil suits have appeared in opposition and have filed responses to Drexel's petition.

It is axiomatic that a judge may not preside over a case when his impartiality might reasonably be questioned. In deciding the sensitive question of whether to recuse a judge, the test of impartiality is what a reasonable person, knowing and understanding all the facts and circumstances, would believe. It is for that reason that we cannot adopt a *per se* rule holding that when someone claims to see smoke, we must find that there is fire. That which is seen is sometimes merely a smokescreen. Judicial inquiry may not therefore be defined by what appears in the press. If such were the case, those litigants fortunate enough to have easy access to the media could make charges against a judge's impartiality that would effectively veto the assignment of judges. Judge-shopping would then become an additional and potent tactical weapon in the skilled practitioner's arsenal. Instead, the sensitive issue of whether a judge should be disqualified requires a careful examination of those relevant facts and circumstances to determine whether the charges reasonably bring into question a judge's impartiality.

I FACTS

We trace the facts and circumstances chronologically. Nearly two years ago, in December 1986, 11 shareholders' class action suits alleging injury as a result of insider trading were brought against Ivan Boesky and others, including Drexel Burnham agents. These actions were filed in the

Southern District of New York and in the Northern and Central Districts of California. The suits brought in the Southern District of New York were assigned to Judge Pollack. In March of 1987 an additional civil fraud action, in which Drexel was also a named defendant, styled *Arden Way Associates, et al. v. Ivan F. Boesky, et al.*, (*Arden Way*), was begun in the Southern District. The two Drexel corporations were represented in these suits by Cahill Gordon & Reindel (Cahill Gordon) of New York City. As a result of the multiple claims asserted in these related class and individual actions, the Judicial Panel on Multidistrict Litigation, on July 24, 1987, brought together all the pending actions, including *Arden Way*, in the Southern District of New York for coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407 (1982). This request to transfer was addressed to Southern District Chief Judge Brieant with a suggestion that all of the class and non-class actions be assigned to Judge Pollack. An order consenting to the transfer was filed on August 5, 1987. The entire group of cases are referred to as "*In re Ivan F. Boesky Securities Litigation*" (*Boesky Litigation*) and charged Drexel, along with other defendants, with acting in concert with Boesky and his affiliated companies to violate the securities and civil anti-racketeering laws of the United States.

For well over a year substantial pretrial activity has occurred in the class and non-class actions. Judge Pollack has issued three published decisions in the multi-district cases—one of which involved Drexel's motion to dismiss the *Arden Way* complaint. He also has issued 36 management orders resolving discovery disputes and establishing discovery schedules. Drexel has, in addition, litigated a number of substantive, procedural, and discovery matters before Judge Pollack.

In June 1988 while the *Boesky Litigation* against Drexel was in full swing, Palais Royal, Inc., a closely held corporation operating a retail chain in Texas entered into negotiations to sell its business in a leveraged buyout (LBO) transaction. The stockholders include Mrs. Moselle Pollack and members of her family. Mrs. Pollack, who is Judge Pollack's wife, is a controlling stockholder. The purchaser is Bain Venture Capital (Bain), which plans to carry-out the transaction through Specialty Holdings, Inc. (SHI), a corporation formed for the purpose of effectuating the acquisition. On June 29, 1988 the stockholders of Palais Royal entered into a contract—called an "Agreement and Plan of Merger"—to sell all of their shares to Bain in exchange for cash. Drexel is not a party to that agreement. The agreement is contingent on Bain's obtaining the necessary financing for the LBO. Bain agreed to use its best efforts to obtain financing on "terms reasonably satisfactory to [Bain]." The financing was Bain's exclusive responsibility, and, at Bain's request, none of the selling stockholders has had any contact with potential lenders. Reliable expert testimony in the form of an affidavit executed by Lewis L. Glucksman, former Chairman and Chief Executive Officer of Lehman Brothers Kuhn Loeb, which the district court credited, stated that the acquisition was not a difficult LBO to finance and that a number of investment banking firms could provide the financing on terms comparable to those offered by Drexel. This opinion was based on the fact that Palais Royal's current management has agreed to continue to operate the company after the consummation of the transaction, and that these same managers have, in recent years, operated the business profitably despite Houston's adverse economic climate. Glucksman concluded that the sale could

be successfully financed with or without Drexel's participation.

When the sale occurs, no member of the now-controlling family will have any interest in Palais Royal. Further, Drexel will have no equity interest in the business. As the deal is now structured, Drexel will have no dealings with Palais Royal or with Mrs. Pollack. Its role is to act as a "best efforts" underwriter or "placement agent" of the debt to be issued by Bain. The dissenting opinion refers frequently to Drexel's role in financing the deal. Yet, even at the time of oral argument before us, Drexel stated that, though it was still exploring the matter and expected to participate, it still had no binding contractual obligation to act for Bain, *i.e.*, to obtain the financing to enable Bain to conclude the transaction. Although Drexel may acquire an option to purchase 15 percent of the new company formed by Bain, it is not obligated to do so, and even if it were to purchase an equity interest in the acquisition vehicle, it would do so only after the Bain/Palais Royal deal had been fully consummated. Thus, Drexel's option to purchase equity securities in the new corporation created by Bain will only arise after Mrs. Pollack is completely disassociated from Palais Royal.

Bernard Fuchs, President and Chief Executive of Palais Royal, stated that, as management's representative (he is not a stockholder), he informed potential lenders with whom he met, including Drexel, that Moselle Pollack is the widow of the company's founder and the wife of Judge Pollack of New York. In addition, in late July or early August, 1988 Bain gave Drexel, as a would-be best efforts underwriter, a copy of the June 29, 1988 agreement, that listed Mrs. Moselle Pollack as a selling stockholder. Drexel's papers reveal that, in July 1988, it

engaged in a substantial "due diligence" inquiry of Palais Royal, focusing on its closely-held ownership and control. In its negotiations with Bain, Drexel was represented by Cahill Gordon, its counsel of record. A Cahill Gordon partner acknowledged having received the June 29th Agreement and Plan of Merger on August 19, 1988.

Earlier, in the spring of 1988, George and Phyllis Asch, stockholders in Palais Royal, met with attorneys at Paul, Weiss, Rifkind, Wharton & Garrison of New York City (Paul Weiss). This law firm represents petitioner Michael R. Milken, a top Drexel official. George Asch claims that, at a meeting in the Paul Weiss law offices on June 2, 1988, the sale of Palais Royal was discussed, particularly with respect to the tax implications for the Aschs as New York resident stockholders. Asch further states that Moselle Pollack's relationship to Judge Pollack and her status as a stockholder in Palais Royal was fully known to Paul Weiss, as reflected in correspondence from a Paul Weiss partner who sent a copy of a letter concerning Palais Royal dated April 6, 1987 to "Mrs. Milton Pollack."

The present proceeding was precipitated on September 7, 1988 when the Securities and Exchange Commission, as plaintiff in the underlying civil enforcement action, filed an 184-page complaint against Drexel and others in the Southern District of New York in an action styled *Securities & Exchange Commission v. Drexel Burnham Lambert Incorporated, et al.*, (*Drexel Litigation*). The complaint, which has nothing to do with Palais Royal, alleges that Drexel and others had devised and carried out fraudulent insider trading schemes, manipulated stocks, and committed other violations of the federal securities laws. Counsel for Drexel maintains that two days later—on September 9—they first became aware that Judge Pollack's wife had

a $30 million interest in the Palais Royal sale. After having been notified of the potential conflict by means of an *ex parte* telephone call placed by Drexel's attorneys on Saturday, September 10, the judge set a hearing in his chambers for September 13, where the situation was explored by the court and by counsel for the SEC and Drexel. The topic of recusal was broached by Drexel's counsel and was rejected by Judge Pollack.

On September 20th a formal motion to recuse was made. At two subsequent hearings—held on September 22 and 27—the district judge did not decide the motion and instead established discovery procedures. Arguments on the recusal motion were scheduled for October 11. Petitioners filed a mandamus application on September 30 in this Court, asking that Judge Pollack be recused in the *Drexel Litigation*, but they did not make the same application with respect to the *Boesky Litigation*. We denied the mandamus application as premature, noting that Judge Pollack had not yet ruled and that a hearing had been scheduled for October 11. Following the hearing, Judge Pollack handed down a written decision in which he denied the motion that he disqualify himself in either the *Drexel Litigation* or the *Boesky Litigation*.

On October 19 the instant mandamus petition was filed. We stayed the district court from conducting any further proceedings, set October 28 as the time for opposition papers to be filed and heard oral argument on the petition for the writ on October 31.

II DISCUSSION

Petitioners urge that the district court judge be recused in this proceeding on three separate bases: (1) under 28

U.S.C. § 455(a) because his "impartiality might reasonably be questioned" by reason of his wife's substantial interest in the Palais Royal transaction; (2) because his personal attacks on defense counsel's integrity purportedly reflect bias and accentuate the alleged appearance of existing impartiality; and (3) under § 455(b)(4) because his wife has a "financial" or "other interest that could be substantially effected" by the outcome of the proceedings.

The SEC, plaintiff in the *Drexel Litigation*, and the class and individual action plaintiffs in the *Boesky Litigation* oppose the application for the writ. They argue, in substance, that Drexel's role is too remote from Mrs. Pollack's sale of stock to bring into reasonable question the judge's impartiality under § 455(a); that there is no basis to conclude that the outcome of the litigation pending in the district court could affect Mrs. Pollack's interest in the Palais Royal transaction; and that the district judge's comments to counsel were an appropriate response in the circumstances. The *Arden Way* plaintiffs also argue that Drexel's untimely use of § 455 was a part of its litigation strategy to manipulate the judicial process. Before we consider the statute, its legislative history, and its construction by this and other courts, we discuss briefly the scope of our review.

A. *Issuance of a Writ of Mandamus and Scope of Review of District Court's Determination*

An appellate court's power to issue a writ of mandamus upon a claim of wrongful refusal to recuse is inextricably related to the scope of review over the district court's determination. Hence, we discuss these subjects together. Although a court of appeals has authority to "issue all writs . . . agreeable to the usages and principles of law," 28 U.S.C. § 1651(a) (1982), "[t]he remedy of mandamus is

a drastic one, to be invoked only in extraordinary situations." *Kerr v. United States District Court*, 426 U.S. 394, 402 (1976); *see also Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34 (1980) (per curiam). Further, it is well-settled that the exceptional remedy of mandamus will only be invoked where the petitioner has demonstrated that its right to such relief is "clear and *indisputable*." *See Moses H. Cohen Memorial Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 18 (1983) (emphasis added); *Allied Chem. Corp.*, 449 U.S. at 35; *In re International Business Machines Corp.*, 618 F.2d 923, 927 (2d Cir. 1980). Were this not so, mandamus applications to review a judge's refusal to recuse would become an effective tactic for harassment and delay.

Discretion is confided in the district judge in the first instance to determine whether to disqualify himself, *see Apple v. Jewish Hospital & Medical Center*, 829 F.2d 326, 333 (2d Cir. 1987). The reasons for this are plain. The judge presiding over a case is in the best position to appreciate the implications of those matters alleged in a recusal motion. In deciding whether to recuse himself, the trial judge must carefully weigh the policy of promoting public confidence in the judiciary against the possibility that those questioning his impartiality might be seeking to avoid the adverse consequences of his presiding over their case. *See In re United States*, 666 F.2d 690, 695 (1st Cir. 1981). Litigants are entitled to an unbiased judge; not to a judge of their choosing.

A judge is as much obliged not to recuse himself when it is not called for as he is obliged to when it is. *See In re Union Leader Corp.*, 292 F.2d 381, 391 (1st Cir.), *cert. denied*, 368 U.S. 927 (1961). Thus, upon reviewing this petition we must determine whether Judge Pollack can

"indisputably" be said to have abused his discretion in denying the motion to recuse himself. *In re United States*, 666 F.2d at 697. As an appellate court, we do not ask outselves whether we would have ruled in the same manner as did the trial court, but rather whether the district judge's decision is a rational one finding support in the record. *See In re United States*, 666 F.2d at 695. Further, in adopting the 1974 amendments to § 455, Congress noted that the revised statute was "not designed to alter the standard of appellate review on disqualification issues." H.R. Rep. No. 1453, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 6351, 6355 (House Report).

Thus, in reviewing the instant petition, we must bear in mind not only the standards governing recusal, but we must also consider the extraordinary showing required to obtain the issuance of a writ of mandamus. In other words, petitioners must "clearly and indisputably" demonstrate that the district court abused its discretion. Absent such a showing, mandamus will not lie.

B. *Statute and Cases*

The pertinent provisions of 28 U.S.C. § 455 provide as follows:

§ 455. Disqualification of justice, judge, or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of dis-

> puted evidentiary facts concerning the proceeding; . . .
>
> (4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(1) § *455(a)*

Section 455(a) of the Judicial Code has a legislative history which sheds some light on the issue facing us. One of the purposes of the enactment was to "clarify" the grounds for disqualification. House Report at 6351. The amended section establishes an objective standard "designed to promote public confidence in the impartiality of the judicial process." *Id.* at 6354-55. Although the "duty to sit" concept has been removed—the House Report continues—the new test is not intended to permit judges to avoid controversial or difficult cases. *Id.* at 6355. Most significantly for our purposes, Congress noted that

> The issue of disqualification is a sensitive question of assessing *all the facts and circumstances* in order to determine whether *the failure to disqualify was an abuse of sound judicial discretion.*

Id. (emphasis added). Thus, the test to be applied is an objective one which assumes that a reasonable person *knows and understands all the relevant facts. See Pepsico, Inc. v. McMillan*, 764 F.2d 458, 460 (7th Cir. 1985); *United States v. Ferguson*, 550 F. Supp. 1256, 1260

(S.D.N.Y. 1982). We disagree with our dissenting colleague's statement that recusal based on an appearance of impropriety under § 455(a) "requires us to judge the situation from the viewpoint of the reasonable person, and not from a purely legalistic perspective." Like all legal issues, judges determine appearance of impropriety—not by considering what a straw poll of the only partly informed man-in-the-street would show—but by examining the record facts and the law, and then deciding whether a reasonable person knowing and understanding all the relevant facts would recuse the judge.

The Supreme Court in *Liljeberg v. Health Services Acquisition Corp.*, 108 S. Ct. 2194 (1988), emphasized that, in amending § 455(a), Congress aimed to promote public confidence in the judiciary. *Id.* at 2202. In *Liljeberg*, the Court was faced with the question of whether a judge who did not have actual knowledge of his direct fiduciary interest in the matter before him should nonetheless have vacated the judgment he had rendered in the matter after he learned of such interest. In affirming the circuit court's reversal of the denial of the motion to vacate, the Court concluded that, despite the judge's actual lack of knowledge, § 455 imposed a stringent standard requiring a judge to inform himself about his personal and fiduciary financial interests. Thus, as a trustee of a university that had a direct stake in the outcome of the litigation over which he was presiding, the judge had a strong fiduciary interest in the resolution of the controversy which, the Court held, required vacatur of the judgment.

Conversely, where an interest is not direct, but is remote, contingent, or speculative, it is not the kind of interest which reasonably brings into question a judge's

impartiality. *See In re Placid Oil Co.*, 802 F.2d 783, 787 (5th Cir.), *reh'g. denied* 805 F.2d 1030 (1986). *Cf. Mavis v. Commercial Carriers, Inc.*, 408 F. Supp. 55 (C.D. Cal. 1975) (district court cannot be disqualified because of ownership of stock in non-party oil company because a remote subsidiary of a corporation with which the oil company had engaged in joint ventures was a party in a proceeding before it).

In addition, it is essential to note that the procedural posture presented in *Liljeberg* differs significantly from the posture in which we are called upon to review Judge Pollack's denial of the recusal motion. Thus, as is more fully discussed below, *Liljeberg* is not only distinguishable from the instant case by reason of the directness of the link between the judge's fiduciary interests and the resolution of a case over which he was presiding, but more importantly, it is inapposite by reason of its procedural circumstances. In *Liljeberg*, the court of appeals was not faced with, as here, a petition for a writ of mandamus, but rather was presented with an ordinary appeal. In the instant case, we are called upon to invoke an extraordinary remedy which requires a showing that the district court indisputably abused its discretion. This clearly differentiates the standard of review applied in *Liljeberg* from that used in reviewing Judge Pollack's denial of Drexel's recusal motion.

(2) § *455(b)(1)*

Under § 455(b)(1) what a judge learns or comes to believe in his judicial capacity "is a proper basis for judicial observations, and the use of such information is not the kind of matter that results in disqualification." *United States v. Bernstein*, 533 F.2d 775, 785 (2d Cir.), *cert.*

denied, 429 U.S. 998 (1976). A determination of bias under this section must be based on extrajudicial conduct, not conduct arising in a trial setting. Decisions or rulings must be adverse to a party, and legal disagreements with counsel are not sufficient for judicial disqualification under § 455(b)(1), or, to state it another way, bias against a lawyer, even if found to exist, without more is not bias against his client. *In re Cooper*, 821 F.2d 833, 841-42 (1st Cir. 1987). *See In re IBM*, 618 F.2d 923, 929 (2d Cir. 1980) (trial judge must be free to make rulings on the merits without the apprehension that if he makes a disproportionate number in favor of one litigant, he may have created the impression of bias).

(3) § *455(b)(4)*

Further, § 455(b)(4) states that a judge is disqualified if he or a family member has a financial interest in the subject matter of the litigation or is a party thereto. Courts faced with construing subsection (b)(4) have inferred that "any other interest that could be substantially affected" also means an interest in the subject matter of the litigation or a party to it. *See Department of Energy v. Brimmer*, 673 F.2d 1287 (Temp. Emer. Ct. App. 1982); *In Re New Mexico Natural Gas Antitrust Litigation*, 620 F.2d 794 (10th Cir. 1980); *In Re Virginia Electric and Power Co.*, 539 F.2d 357 (4th Cir. 1976).

III ANALYSIS

We begin analysis of the facts and circumstances under § 455(a) by setting them forth. First, we identify and analyze the charges of partiality and, second, we set forth the assertions made by respondents to the petition.

A. § *455(a)*

1. *Petitioners' Charges*

Petitioners charge that because Mrs. Pollack is obtaining $30 million for the sale of her stock in Palais Royal there has been created an appearance of impropriety that requires Judge Pollack's recusal. The charge is based on the two premises: that Drexel's money will be paid to Mrs. Pollack and that Drexel is indispensable to the transaction. Neither statement is true. Mrs. Pollack has had no business or other dealings with Drexel; she will receive no money from Drexel; and Drexel is not essential to the completion or success of the transaction. Moreover, there is no nexus, direct, indirect or otherwise, between the civil suits pending before Judge Pollack and Mrs. Pollack's interest in Palais Royal.

Instead, the relevant facts are that Drexel has a potential commitment to Bain or SHI, *not* to Palais Royal or to Mrs. Pollack. If Drexel performs its role, the funds will belong to Bain and *not* to Palais Royal; if Drexel fails to perform for Bain or SHI, some other financial institution is likely to because it is a profitable opportunity. As previously noted, Lewis L. Glucksman states in an affidavit that a number of major investment banking firms could handle the placing of Bain's notes on terms comparable to those offered by Drexel. The facts support that conclusion. Palais Royal has operated profitably for 21 consecutive years despite recent regional hardship, and its present management will be retained by Bain.

Consequently, Judge Pollack's connection is too remote to mandate recusal because Drexel has no obligation direct or indirect to Mrs. Pollack. To adopt petitioner's theory would mean that any remote connection even, for exam-

ple, to investors who buy SHI bonds from Drexel would mandate recusal. Thus, the price of avoiding any hint of impropriety, no matter how evanescent, would grant litigants the power to veto the assignment of judges. In our view, petitioners' theory would carry a worthy policy too far.

2. *Respondents' Claims*

We next set forth the assertions made by respondents through affidavits claiming lack of timeliness and an attempt by Drexel to manipulate the judicial process through judge-shopping. These assertions are not established facts upon which decision may rest. Yet, they constitute those circumstances that an "objective observer", *see Liljeberg*, 108 S. Ct. at 2203, or a reasonable person knowing all the facts and circumstances should consider in order to decide whether the failure to recuse was an abuse of sound judicial discretion. House Report at 6355.

A paralegal employed by the SEC states that when she attempted to file the underlying civil fraud complaint in the Southern District Clerk's office on September 7, defendant Lowell Milken's counsel who was waiting at the clerk's office—apparently having foreknowledge of her arrival—"tried to prevent [her] from filing the Drexel court papers." The Deputy Chief Litigation Counsel in the Enforcement Division of the SEC, also present at the Clerk's office on September 7, asserts in an affidavit that one of Drexel's attorneys "threatened that if the Commission filed its action as one related to those pending before Judge Pollack", he would seek Rule 11 sanctions against him and the other lawyers responsible for filing the action.

Immediately thereafter counsel representing various Drexel defendants and the SEC went to Judge Pollack's

chambers where Drexel's counsel requested that the judge refrain from accepting the case until they had an opportunity to consult with other counsel. Three days later Drexel's counsel telephoned Judge Pollack at his house on Saturday afternoon September 10, *ex parte*, and without prior notification to SEC's counsel. The purpose of the call was to advise the Judge that Mrs. Pollack was going to get $50 or $60 million from Drexel. At the hearing held on September 13, Drexel's counsel, Thomas F. Curnin of Cahill Gordon, acknowledged that he could not be sure what the agreement provided because he had never seen the June 29th Agreement and Plan of Merger, which prompted his concern and brought about the *ex parte* telephone call to the judge's home. Based on this patently inadequate examination by a member of the same firm that had been representing Drexel in its negotiations with Bain, the judge made a strong Rule 11 comment. No one disputes that until the telephone call, Judge Pollack had no intimation of Drexel's role in assisting Bain finance its stock purchase.

At the September 22 hearing, oral argument on the recusal motion was set for October 11. On September 30, before the SEC had responded, Drexel filed its first mandamus petition before us, which we ruled was premature. At the October 11 hearing only Drexel urged Judge Pollack's disqualification. The plaintiffs in the *Boesky Litigation* argued that because Judge Pollack had been actively presiding over their cases for 18 months, his recusal would seriously prejudice them.

Because Drexel's counsel was before Judge Pollack defending Drexel in the *Boesky Litigation* for over a year, and because the same counsel represented Drexel in its negotiations with Bain—and saw the agreement between

Bain and the selling Palais Royal stockholders—it seems plausible that Drexel knew or should have known in July or August, 1988 that Mrs. Pollack was a stockholder selling to Bain. Further, petitioner Michael Milken's counsel, Paul Weiss, apparently knew even earlier that Mrs. Pollack was a selling stockholder in Palais Royal. Moreover, Drexel's proposal to Bain did not occur until well after Judge Pollack had been assigned to preside in the multidistrict *Boesky Litigation*.

Whether Drexel's involvement in the Palais Royal transaction sprang from an improper motive is not now known. Yet, based on all the recited circumstances, respondents assert that to grant mandamus will establish a dangerous precedent permitting a party, by its own actions, to effect the recusal of a judge already presiding over the litigation. Of course, respondents' assertions are not established as matters of fact. Consequently, our decision does not turn on these assertions. Nonetheless, they are circumstances that a reasonable observer would want to know in deciding whether Judge Pollack's refusal to recuse himself created an appearance of impropriety.

We believe that, in light of the facts and circumstances that are known, a reasonable person would not conclude that the judge's impartiality could reasonably be questioned under § 455(a). Such conclusion is reinforced because of the particular procedural posture in which this case is before us as a petition for a writ of mandamus. Certainly the circumstances just recited make it evident that petitioners have failed to establish the necessary clear and indisputable right to that extraordinary writ.

B. § *455(b)(1)*

Petitioners' counsel claim that Judge Pollack's criticism of their behavior shows that the judge is personally biased and provides additional grounds for his recusal. To the contrary, counsel's misconduct drew what appears to us to be appropriate warnings from the district court. An appellate court, in passing on questions of disqualification of the type here presented, determines the disqualification on the basis of conduct which shows bias or prejudice or lack of impartiality by focusing on a party, not on counsel. The sharpness in colloquy between the judge and counsel, quoted by petitioners, does not demonstrate bias, but is well within the acceptable boundaries of courtroom exchange. *See In re IBM*, 618 F.2d at 931-32. Further, the remarks made by Judge Pollack challenged by petitioners were made in the context of judicial conferences and hearings and were directly addressed to the conduct of the attorneys before him; they did not extend to extrajudicial matters beyond that conduct. We see no reason for disqualification in these exchanges. Finally, petitioners argue that the district court's October 10 order to show cause why the motion to recuse should not be withdrawn and why Paul Weiss should not be investigated for its allegedly conflicting representation with respect to the Palais Royal deal is a demonstration of actual bias that mandates recusal under § 455(b)(1). We cannot agree. Although we do not reach the merits of the show cause order, the trial court's actions do not reflect prejudice or lack of impartiality regarding the parties to the litigation. The substantive issues embodied in the order were directed at counsel's actions and are not therefore cognizable under § 455(b)(1). Should litigation proceed to final judgment or other conclusion, and should bias later be found to have

permeated the case, that situation may be corrected on direct appeal.

C. § *455(b)(4)*

Finally, petitioners place little emphasis on § 455(b)(4). They contend that Mrs. Pollack's participation in the Palais Royal transaction is an "other interest" that could be "substantially affected" by this proceeding, but do not explain how the outcome of this lawsuit could affect Mrs. Pollack's interest in the Palais Royal transaction, let alone "substantially affect" that interest. In fact, we see no basis to conclude that this litigation could have any effect whatsoever on the Palais Royal transaction. Hence, there is no merit to this claimed ground for disqualification.

IV CONCLUSION

In sum, we conclude that an objective observer knowing and understanding all the facts and circumstances could not reasonably question Judge Pollack's impartiality. Petitioners have not clearly and indisputably established their right to a writ. Accordingly, for the reasons stated, the petition for a writ of mandamus is denied.

LUMBARD, *Circuit Judge*, dissenting:

We should grant the writ of mandamus and direct Judge Pollack to recuse himself from consideration of these cases.

Events which no one could have foreseen, and which no one arranged, have created a reasonable doubt of Judge

Pollack's impartiality in supervising these cases. Drexel inadvertently has been brought into a relationship with the financial interests of the wife of the judge who happens to be responsible for deciding litigation of great public importance brought against Drexel and four of its principals by the Securities and Exchange Commission (SEC) and individual plaintiffs. Judge Pollack has refused to recuse himself. The sole question before us is whether, in view of the wide publicity accorded these so-called insider trading cases, Judge Pollack's "impartiality might reasonably be questioned", 28 U.S.C. § 455(a), by a reasonable person knowing the relevant facts.

To me, the inescapable relevant fact is that Drexel has been, and is now, retained by the firm which is under contract with Mrs. Pollack and members of her family to arrange financing for the cash purchase of Palais Royal, their family business, from which members of the family will receive over $84 million and Mrs. Pollack herself, and as trustee, will receive $30 million in cash. It is clear to me that a reasonable person knowing these ultimate conceded facts would reasonably question Judge Pollack's ability to supervise such litigation impartially. Such a reasonable person's next question would be "Why hasn't the judge stepped aside?" Moreover, Judge Pollack's expressed resentment to the suggestion of recusal and his castigation of Drexel and its counsel has confirmed these doubts. He cannot act impartially in these cases.

There is absolutely no evidence that Drexel agreed to act for Bain in order to manufacture a situation in which Judge Pollack's continued participation in ongoing litigation could be challenged. Drexel became involved in the Palais Royal deal in the same manner in which it might become involved in any of its deals. First, the stockholders

of Palais Royal, consisting of Mrs. Pollack and family members, agreed on June 29, 1988 to sell the company to Bain Venture Capital (Bain) for over $84 million, on condition that Bain obtain financing for the purchase. Thereafter, Bain arranged with Drexel to obtain the necessary financing for the purchase of Palais Royal and another business with which Palais Royal is to be merged, in what is known as a leveraged buyout (LBO). It is undisputed that Bain sought out Drexel, a leading company in the successful and profitable managing of LBOs; Drexel did not seek to create a disqualification issue.

Moreover, there is no evidence that Drexel is not committed to this transaction. Although the majority suggests that Drexel may not be contractually obligated to Bain, the evidence before us leads to the opposite conclusion. The majority's attempt to deemphasize the nexus between Palais Royal and the instant litigation by hypothesizing that a court conceivably might find Drexel uncommitted to Bain is to brush aside both the uncontroverted evidence and the reasonableness standard of § 455(a). Drexel already has agreed to supply in excess of $200,000,000; it has completed an extensive "due diligence" investigation. It also has an option to purchase 15% of the acquiring company. Although the June agreement fixes no closing date, the parties expect to close the deal sometime in November 1988.

The record is similarly devoid of any evidence which suggests that Drexel waited until an opportune moment to "discover" the conflict. On September 7, 1988, the SEC filed suit against Drexel and four of its principals seeking injunctive relief and disgorgement of profits. On the SEC's suggestion that this new action was related to other civil suits already supervised by Judge Pollack, it was

assigned to him. Two days later, on September 9, Bain advised Cahill Gordon & Reindel (Cahill Gordon), Drexel's counsel, that the Moselle Pollack who had signed the agreement with Bain and who had a $30 million interest in the Palais Royal buyout was the wife of Judge Pollack. Drexel's attorney informed Judge Pollack by telephone on the very next day of Mrs. Pollack's interest in the deal.

When it became known to counsel for Drexel that the Moselle Pollack who would benefit from the buyout was the wife of Judge Pollack, the judge conducting the cases involving Drexel, it was their duty to bring the matter to the judge's attention without delay. The duty to inform a judge of a potential conflict rests upon whichever party becomes aware of such a situation. Any feelings which either party may have about the judge's favoring one or the other are wholly immaterial. To save embarrassment, time and expense, and the validity of any judgment, counsel have a duty to act promptly.

According to the undisputed evidence in the record before us, the Cahill Gordon attorneys who were representing Drexel in these cases did not know until September 9 that Moselle Pollack was the wife of Judge Pollack. Different attorneys in the firm had been representing Mrs. Pollack in her negotiations for the sale of Palais Royal, and nothing in the record indicates that anyone at Cahill Gordon knew of the link before September 9. If, as the SEC suggests, Drexel was anxious to get Judge Pollack out of these cases, it would seem that someone at Cahill Gordon would have acted as soon as the firm became aware that the judge was Moselle Pollack's husband. In sum, there is no reason to believe that Cahill Gordon could have acted any sooner than it did.

At this point in the proceedings, Judge Pollack's resentment at the idea of recusal became apparent. After conference with counsel in his chambers on September 13, Judge Pollack refused to consider recusal. He called the suggestion a "cockamamie story" and threatened counsel with sanctions for acting on "insufficient information."

On September 20, the petitioners filed a formal motion to recuse, returnable October 4, which Judge Pollack adjourned to October 11th. As the judge continued to rule on pretrial matters in the private civil cases, the petitioners sought a writ of mandamus on September 30. We denied the petition as premature in view of the hearing scheduled for October 11.

Meanwhile, on October 10, the day before he was to hear the recusal motion, Judge Pollack, on his own motion, issued an order directing Paul, Weiss, Rifkind, Wharton & Garrison (Paul, Weiss), which represents Michael R. Milken, a top Drexel official involved in the SEC litigation and the petition for recusal, and two of its partners, Arthur Liman and Martin Flumenbaum, to show cause why "they should not be required to identify and withdraw the papers on said disqualification motion which they have drafted, filed and served herein." With the order, Judge Pollack served copies of documents from his family's files to support his charge that, by joining in the recusal motion on behalf of the individual principals of Drexel, the Paul, Weiss firm was undertaking "conflicting" representation and acting adversely toward the Pollack family members, whom they had represented in other matters. At the October 11 hearing, Judge Pollack refused to hear argument on his order and referred the matter to Chief Judge Brieant "for disciplinary resolution, if required."

It appears from this response to the recusal motion that the judge viewed the suggestion that he recuse himself from the Drexel litigation as adverse to the interests of his family—as if his continued participation in this litigation would be favorable to those family interests.

Judge Pollack's hostility towards the moving parties was repeated in his opinion of October 17. Judge Pollack emphasized the lack of "privity" between Mrs. Pollack and Drexel, writing that Mrs. Pollack's transaction "is not a Drexel-financed transaction." He also made much of the argument that Drexel is not essential to the deal and that Bain could easily retain one of Drexel's competitors to provide the required financing. In finding no reasonable basis for doubting his impartiality, Judge Pollack wrote that the "speculations" in which Drexel's lawyers engaged to "concoct[ ]" perceptions of impropriety seem so "far-fetched" as reactions of a reasonable person as to be "ludicrous".

My colleagues, in denying the petitioners' renewed application for mandamus, also rely upon the lack of "privity" between Mrs. Pollack and Drexel. Their argument rests on the fact that, instead of Drexel paying Mrs. Pollack with its own check for $30 million, Drexel will arrange the payment to a Bain subsidiary created for that purpose, which in turn will pay the $30 million to Mrs. Pollack. This can fool no one regarding who is responsible for raising the money and causing it to get to Mrs. Pollack. According to present plans, Mrs. Pollack will not get $30 million but for Drexel.

In this case, to impute a lack of privity is to exalt the form of the transaction over its substance, and to ignore the reasonableness standard of § 455(a), which requires us to judge the situation from the viewpoint of the reasonable

person, and not from a purely legalistic perspective. Drexel is integrally involved in this transaction and has been so for several months. It is largely because of Drexel's efforts that Mrs. Pollack will receive $30 million. That is the common sense of it; and it most certainly is the public perception that Mrs. Pollack is to be paid $30 million thanks to Drexel.

Of course, there might have been others who would be interested in working on the deal, but that is irrelevant. If Bain could have made other arrangements with a firm as well qualified as Drexel and on equally advantageous terms, it probably would have done so during the weeks when it was working on the deal and before it chose Drexel. In the absence of any showing of artifice on Drexel's part, the question is whether Judge Pollack reasonably appears not to be impartial. It is beside the point to assert that there is no showing that Drexel is indispensable.

The nature and extent of the interest of Mrs. Pollack and her family in the deal from which the family members will receive no less than $84 million is obviously of concern to Judge Pollack. His interest is considerably stronger than was the fiduciary interest of Judge Robert Collins, as a trustee of Loyola University, which the Supreme Court recently considered in *Liljeberg v. Health Services Acquisition Corp.*, 108 S. Ct. 2194 (1988). In *Liljeberg*, Loyola had contracted to sell a tract of its land for about $6.5 million to John Liljeberg, Jr. for the construction of a hospital, subject to a buy-back clause which would be triggered if Liljeberg did not secure a construction contract within one year and Loyola did not receive certain benefits from the anticipated rezoning of Loyola's land adjacent to the hospital. At the same time, Judge Collins was presiding over an action in which a third party, with whom Liljeberg

was contemplating building a hospital on a different site, was challenging Liljeberg's ownership of a state-issued "certificate of need" for a hospital. Had Liljeberg not won ownership of the certificate, which is required for the successful operation of a hospital, it is likely that the buy-back provision would have been triggered and that Loyola would have lost the benefits associated with the hospital's construction.

Unlike Judge Pollack, who has been aware of his conflicting interest since the third day after the SEC filed suit, Judge Collins did not actually know about his fiduciary interest in the litigation until after he had filed his opinion. The Supreme Court nevertheless held that the judge's attendance at meetings of the Board of Trustees at which the prospective sale was discussed raised reasonable doubts about his impartiality and vacated Judge Collins' judgment.

The *Liljeberg* Court squarely held that whenever a question involving disqualification is presented, it is critical promptly to examine all possible bases for the judge's disqualification. *Liljeberg*, *supra*, at 2205. The Court found unconvincing the facts that Loyola was not a party to the suit, that the judge was unaware of the conflict during the pendancy of the case, and that the judge's interest was only as a fiduciary rather than as a personal investor. What persuaded the Supreme Court to vacate the judgment after it was entered was the appearance of impropriety. As the *Liljeberg* Court said: "[P]eople who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges. The very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety

whenever possible." 108 S. Ct. at 2204-05 (footnote omitted).

Such an appearance of impropriety is, in fact, usually avoided by our federal judges as a matter of course. Since well before the amendment of § 455 in 1974, it has been the custom of federal judges in the Second Circuit and elsewhere to recuse themselves whenever they or their spouses hold any stock or have any financial interest of any kind, however small, in any company or enterprise which is a party, or is linked with any party, in any matter coming before them. Each year every judge, including every senior judge who still sits, must file a statement of the stock holdings and other investments of the judge and the judge's spouse. That statement also reflects the sales and acquisitions of such interests during the preceding year. The spirit of these practices has been to resolve any doubt in favor of recusal. *See United States v. Murphy*, 768 F.2d 1518, 1536-41 (7th Cir. 1985).

Moreover, the American Bar Association Code of Judicial Conduct requires that a judge recuse himself whenever "he knows that he . . . or his spouse . . . has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by [its] outcome." A.B.A. Code of Judicial Conduct Canon 3C(1)(c). Given the public attention that has been focused on the disclosures regarding insider trading and the public concern for the integrity of the marketplace, there is a heightened awareness of the importance of insuring the absolute impartiality of any judge who participates in the resolution of litigation concerning such activities. If Judge Pollack remains in charge of these cases, Mrs. Pollack's financial interest in Drexel's

successful completion of the deal can only exacerbate these public concerns.

The cases relied upon in opposition to the petition for mandamus are inapposite. In *Mavis v. Commercial Carriers, Inc.*, 408 F. Supp. 55 (C.D. Cal. 1975), Judge Hauk held that recusal was not required where the judge owned some common stock in a subsidiary, twice removed, of a corporation that had done some business with the defendant company. In *Mavis*, the corporation indirectly owning the company in which the judge held stock had done business with the defendant in the past. The Palais Royal buyout, on the other hand, is happening now.

In re Placid Oil Co., 802 F.2d 783 (5th Cir. 1986), held that the judge's ownership of stock in a bank did not mandate his recusal from a case involving unrelated banks. The argument in support of his recusal, that the outcome of the litigation might affect the banking industry generally, was speculative and too remote from the judge's investment in a different bank. 802 F.2d at 786-87. Mrs. Pollack's imminent realization of $30 million from the deal which Drexel is financing is hardly so speculative or remote.

Finally, I turn to the appropriateness of mandamus in this situation. While mandamus is indeed an extraordinary remedy, no cases have been cited that would bar the issuance of the writ in a situation as extraordinary as that before us. On the contrary, we have repeatedly held that mandamus is appropriate in recusal motions, believing that there are "few situations more appropriate for mandamus than a judge's clearly wrongful refusal to disqualify himself." *In re International Business Machines Corp.*, 618 F.2d 923, 926 (2d Cir. 1980) (quoting from *Rosen v. Sugarman*, 357 F.2d 794, 797 (2d Cir. 1966)). *See also In*

re United States, 666 F.2d 690, 694 (1st Cir. 1981) (public confidence in the courts requires that questions of disqualification must be disposed of at the earliest possible opportunity). Moreover, we have held that the standard for review of a judge's refusal to recuse himself is *not* an abuse of discretion standard. Rather, we must query whether the trial judge could exercise that discretion in the face of a "personal, extrajudicial bias which precludes dispassionate judgment." *In re International Business Machines*, *supra*, at 926.

Fortunately, the proceedings in the suit brought by the SEC have just begun, and in the private civil cases discovery and pretrial proceedings are still underway. It is not unusual for cases to be transferred to other judges in the court as the need to do so arises. In addition to Judge Pollack, there are presently 23 active district court judges in the Southern District of New York and more than a dozen senior district judges who still sit. In the case before us, in which Drexel is underwriting a transaction in which Judge Pollack's wife will receive $30 million, we must act to avoid compounding the harm already done to the public's perception of the integrity of the judiciary.

A central pillar of our government is the people's confidence that our courts are free of bias or favor and are administered by judges who are unquestionably impartial. Whenever any reasonable basis to doubt a judge's impartiality exists, this public trust demands that we act swiftly and decisively.

We should grant the petition for mandamus and direct Judge Pollack to recuse himself.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 88-3060

Filed February 21, 1989

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-first day of February, one thousand nine hundred and eighty-nine.

In re Drexel Burnham Lambert Incorporated,
Drexel Burnham Lambert Group Incorporated,
Michael R. Milken, Lowell J. Milken,
Cary J. Maultasch, and Pamela R. Monzert,

Petitioners.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for petitioners,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing en banc having been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal, a request that a poll be taken thereon having been

made, and a vote having been taken thereon and a majority of the active members of the court not having voted in favor thereof, it is further

Ordered that said petition containing a suggestion for rehearing en banc is DENIED. An opinion of Judge Meskill concurring in the denial of the petition; an opinion of Judge Pierce, concurred in by Judges Meskill, Cardamone and Miner, concurring in the denial of the petition; and an opinion of Judge Miner, concurred in by Judges Meskill, Cardamone and Pierce, concurring in the denial of the petition; and an opinion of Judge Newman, concurred in by Judges Kearse, Pratt and Altimari, dissenting from such denial, are filed herewith.

ELAINE B. GOLDSMITH,
Clerk

/s/ ELAINE B. GOLDSMITH

MESKILL, *Circuit Judge*, concurring in Judge Pierce's concurrence in the denial of rehearing *in banc*:

Although I was not a member of the panel hearing this matter, I concur with the sentiments expressed by Judge Pierce, who was a majority member of the panel, in his concurrence in the denial of rehearing *in banc*.

PIERCE, Circuit Judge, with whom MESKILL, CARDAMONE and MINER, Circuit Judges, join, concurring in the denial of rehearing in banc:

I write in concurrence with the majority which has denied rehearing in banc. The dissenting opinion is correct

in implying that such statements are infrequently made. However, the publication thereof makes it appropriate to state another view.

Whether the district judge's impartiality might reasonably be questioned on the facts and circumstances present in this case should not be assayed on a record that is so antiseptic as to cause this court to be oblivious to the serious charges of judge-shopping made by respondents in their briefs and submissions. Although no findings have been made regarding this aspect of the case, it cannot be gainsaid that the question of alleged judge-shopping is a significant contextual matter. The presence of the judge-shopping issue in the case places upon this court the burden of scrutinizing with exceptional care the petitioners' efforts to have the district judge disqualified from continuing to preside over this litigation.

Most of the subject litigation was assigned to Judge Pollack in 1986 and 1987, and substantial pretrial activity had occurred by September 1988 when the SEC filed a 184-page civil complaint against Drexel in a civil enforcement action; it too was assigned to Judge Pollack. None of these actions involves Palais Royal, Inc. or the judge's wife, a major shareholder.

Soon after the SEC action was assigned to Judge Pollack, Drexel, at Bain's instance, took on the funding burden of Bain's purchase of Palais Royal. Drexel then engaged in an undisputed course of conduct with respect to Bain's acquisition of Palais Royal, all the while knowing that the subject litigation was assigned to Judge Pollack. Thus, the respondents in effect contend that Drexel, by its own actions, set the stage to seek the removal of the judge who had presided over much of this litigation for approximately two years. Are litigants to have the power

by their own actions to veto the assignment of judges? Additionally, in considering the merits, the panel majority was confronted with the reality that Drexel owed no duty whatsoever to Palais Royal or to the district judge's wife, and it therefore concluded that Drexel's participation in the financing role it chose to assume was too remote from Bain's acquisition of Palais Royal to require Judge Pollack's disqualification. Under these circumstances, would a reasonable observer believe that Judge Pollack's refusal to recuse himself created an appearance of impropriety? Isn't the exceptional grant of a writ of mandamus to be made only when there is a clear and indisputable right to it? *See Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 18 (1983).

More problematic is the district judge's accusation of professional lapses by the firm representing a petitioner. In this demonstration of sensitivity to the question of whether counsel had transcended acceptable professional bounds, the district judge came perilously close to the indistinct line beyond which recusal is required.

However, two grounds militated against requiring his disqualification based on this episode: to begin with, the caselaw draws a distinction between a judge's conduct toward counsel and his conduct toward counsel's client. *See In re Cooper*, 821 F.2d 833, 841 (1st Cir. 1987); *Rosen v. Sugarman*, 357 F.2d 794, 798-800 (2d Cir. 1966). Although hostility directed at counsel *can* reach bounds which warrant relief if it appears that the client will be harmed, in the panel majority's view such is not the case here. Moreover, this conclusion is supported by the fact that no final determination was or will be made by Judge Pollack regarding the charges levelled at counsel. Rather, in accordance with the district court's rules, the issue has

been referred to that court's chief judge and to the court's appropriate disciplinary panel for their consideration and presumably for ultimate determination. *See* Rule 4(i), General Rules, Rules for the United States District Courts for the Southern and Eastern Districts of New York (1987).

Most importantly, in the event that Judge Pollack should demonstrate partiality in handling this litigation, and should it result in the denial of a just and fair outcome for Drexel, such bias would be a weighty issue to be raised by Drexel on a direct appeal, especially since the applicable standard of review would no longer require Drexel to show that it had a "clear and indisputable" right to relief, the standard which is applicable to petitions for writs of mandamus but not to direct appeals.

I concur in the court's majority view that this is not a proper case for in banc review.

MINER, *Circuit Judge*, with whom MESKILL, CARDAMONE and PIERCE, *Circuit Judges*, join, concurring in the denial of rehearing in banc:

Merely to record my vote to deny rehearing in banc would be to permit the "expression of views" in the dissenting opinion to go unchallenged. It seems to me that the sensitive nature of the issues before us compels a reasoned rebuttal of the dissenters' conclusions. I therefore write separately to give my reasons for concurring in the majority determination.

In banc review is warranted "(1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a

question of exceptional importance." Fed. R. App. P. 35(a). In suggesting in banc review in this case, petitioners have neither demonstrated a lack of uniformity in our decisions relating to recusal of district court judges nor identified a legal question of transcending importance. Rather, the panel majority has applied well-settled rules to the specific facts of this case in deciding that the petition for writ of mandamus should be denied. Neither the panel dissenter nor the in banc dissenters contend that the applicable rules should be changed. Accordingly, the standard for in banc review simply has not been met.

To determine whether Judge Pollack's impartiality might reasonably be questioned, *see* 28 U.S.C. § 455(a), the panel majority properly reviewed as an "objective observer," *Liljeberg v. Health Services Acquisition Corp.*, 108 S. Ct. 2194, 2203 (1988), the facts and circumstances surrounding the sale of Palais Royal stock by Mrs. Pollack to a buyer whose purchase was financed by Drexel Burnham Lambert Inc. That review revealed:

> Mrs. Pollack has had no business or other dealings with Drexel; she will receive no money from Drexel; and Drexel is not essential to the completion or success of the transaction. Moreover, there is no nexus, direct, indirect or otherwise, between the civil suits pending before Judge Pollack and Mrs. Pollack's interest in Palais Royal.

In re Drexel Burnham Lambert Inc., 861 F.2d 1307, 1314 (2d Cir. 1988).

It seems quite unexceptional to draw from these findings an objective conclusion that no appearance of partiality would be provided by Judge Pollack's continued service in the actions against Drexel. It certainly cannot be said that Judge Pollack, by reason of Drexel's financing of

the Palais Royal deal, has any personal prejudice regarding the parties or personal knowledge of the facts underlying those actions, *see* 28 U.S.C. § 455(b)(1), or that he or his wife have any financial interest that could be affected by the outcome of those proceedings, *see* 28 U.S.C. § 455(b)(4). Nor were these conclusions affected when Drexel put up some of its own money to close the deal and thereafter acquired an equity in the purchaser, all of which was contemplated by the panel majority. The "flow of substantial sums" to Mrs. Pollack from Drexel, referred to by the in banc dissenters, was much too indirect and circuitous a movement to lead reasonable, objective and impartial observers along the path taken by my dissenting colleagues.

That Judge Pollack referred to a grievance committee charges of professional misconduct involving an alleged breach of his wife's confidence on the part of certain attorneys representing a Drexel officer is not an indication of "personal bias or prejudice concerning a *party*," 28 U.S.C. § 455(b)(1) (emphasis added). Neither does it present a situation in which the Judge's impartiality might reasonably be questioned, *see* 28 U.S.C. § 455(a). A judge who reports a violation of the Code of Professional Responsibility, whether involving himself, a member of his family or someone else, should not face recusal for that reason. All lawyers are encouraged to bring to the attention of the appropriate authorities perceived violations of the ethical standards of the bar. *See* Model Rules of Professional Conduct Rule 8.3 (1983); Model Code of Professional Responsibility DR-103(A) (1980). It would be much too easy a matter for an attorney to engage in some minor breach of the Canons of Ethics directed against the Judge or a member of the Judge's family if recusal could be forced by that means. If recusal is not warranted where the

judge holds an attorney in criminal contempt, *see Rosen v. Sugarman*, 357 F.2d 794, 799-80 (2d Cir. 1966), it should not be warranted where there is merely a *referral* to an appropriate authority to determine if there has been any misconduct. Involved in that referral here is only one of nine firms representing petitioners, and the *parties* to the underlying litigation can have no reasonable basis to question Judge Pollack's impartiality because he has raised, but not resolved, a question of professional ethics.

My dissenting colleagues say that the litigation continues under a "cloud" because the panel majority applied mandamus standards and the recusal questions may again be presented on plenary appeal. However, the panel has ruled on all the significant issues pertaining to recusal that have been raised up to this point. Its conclusions merely were "reinforced" by the stringent requirements for success on a mandamus petition. 861 F.2d at 1316.

Finally, a majority of the active judges of this court have determined to deny rehearing in banc. Under such circumstances, it ill behooves the dissenters to suggest that it would be an act of "judicial statesmanship" for the district judge to request that the case be reassigned—a request that we now have decided he need not make.

JON O. NEWMAN, *Circuit Judge*, with whom KEARSE, PRATT, and ALTIMARI, *Circuit Judges*, join, dissenting:

We respectfully dissent from the denial of rehearing in banc. Though a statement of reasons for such a dissent is often neither needed nor useful, we believe an expression of views is appropriate in this instance.

The Court has been asked to rehear the panel decision denying a petition for mandamus seeking recusal of the District Judge in this case. *See In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307 (2d Cir.1988). Two circumstances bear upon the question of recusal:

1. The Judge's wife is to receive approximately $30 million in connection with her sale of stock in a family business, and the financing of the stock purchase is being arranged by Drexel Burnham Lambert Inc., one of the parties in litigation now pending before the Judge.

2. The Judge has referred to a grievance committee charges of professional misconduct by some of the lawyers in the pending litigation based on allegations that they have breached the confidence of the selling shareholders, including the Judge's wife.

The reasons why the first circumstance requires recusal have been forcefully set forth in the panel dissenting opinion of Judge Lumbard. At the time of the panel opinion, Drexel's role was solely that of financier for the purchaser. It is now alleged by counsel for two of the petitioners that Drexel's role in the now completed transaction has increased since the Judge's ruling: Drexel put up nearly $200 million of its own money as a bridge loan and directly and indirectly acquired 8.5% of the equity in the purchaser. The flow of substantial sums of money from Drexel, the litigant before the District Judge, to the Judge's wife, is now more direct than before.

The second circumstance places the Judge in the role of adversary, on behalf of his wife, to counsel now appearing in the litigation before the Judge. Though a judge need not and should not recuse when, solely in his capacity as a judicial officer, he observes attorney conduct that warrants inquiry by an appropriate disciplinary body and calls

such conduct to the body's attention, *see In re Cooper*, 821 F.2d 833, 842-44 (1st Cir. 1987) (recusal not warranted where trial judge condemns attorney's conduct as violation of Code of Professional Responsibility); *cf. Rosen v. Sugarman*, 357 F.2d 794, 799-800 (2d Cir. 1966) (recusal not warranted where trial judge held attorney in criminal contempt for courtroom conduct), the present situation involves the District Judge, not solely as a presiding judicial officer, but as the husband of a principal victim of the attorneys' alleged ethical violation.

These are extraordinary circumstances, raising profound questions as to the standards for recusal and the role of this Court in maintaining the highest standards of judicial propriety in this Circuit. Some of us believe that rehearing in banc is warranted by at least one of these circumstances and some believe it is warranted by both circumstances. All of us believe that rehearing in banc should be ordered.

The panel that denied the mandamus petition applied the strict standards for mandamus and concluded that circumstances known to the panel at the time of its decision did not demonstrate that "clear" and "*indisputable*" right to mandamus that is required for issuance of the writ. *See In re Drexel Burnham Lambert Inc.*, *supra*, 861 F.2d at 1312 (emphasis in original). Even though that decision will not be reconsidered in banc, serious questions concerning recusal remain in the case and will be available for plenary review by the panel that will consider any appeal that may be taken from the final judgment. It would be unfortunate if this important litigation were to continue under such a cloud. As with any in banc vote, the denial of rehearing does not necessarily signify agreement with the panel opinion. *See Peter Pan Fabrics, Inc. v.*

Dixon Textile Corp., 280 F.2d 800, 805 (2d Cir. 1960) (Waterman, J., concurring in denial of rehearing in banc). Thus, the fact that a majority of the active judges of this Court have voted not to rehear the mandamus ruling in banc is not necessarily an indication that a majority of this Court believes that the District Judge's continued participation is proper.

We urge the District Judge, now that his recusal ruling has been upheld upon the narrow review appropriate to a mandamus petition, not to jeopardize the outcome of this litigation by continuing a role that poses substantial risks of ultimate reversal. Several factors warrant his reconsideration. First, there have been developments since his ruling that strengthen the case for recusal. Second, there is an impending settlement of a portion of the litigation. Third, the Judge's ruling reveals that in one important respect he misconceived the reasons for recusal. He stated the reasons to be that Drexel would not want "to bear the burden" of a favorable, though deserved, ruling on the merits of the case and that an unfavorable ruling might be perceived as attributable to a failure of the stock sale to happen. *SEC v. Drexel Burnham Lambert Inc.*, No. 88 Civ. 6209 at 6 (S.D.N.Y. Oct. 17, 1988). Though rejecting these concerns as "far-fetched," *id.*, he failed to consider the entirely valid concern that no litigant should have to endure the risk that a judge, encountering circumstances that show a basis for partiality, might bend over backward to rule against the litigant on close questions in order to demonstrate impartiality. *Cf. Cooke v. United States*, 267 U.S. 517, 539 (1925) (substitution of trial judge sometimes warranted in criminal contempt matters to avoid risk that judge might "bend backward" in making ruling).

An alternative to reconsideration would be for the Judge to seek the advice of the Advisory Committee on

Codes of Conduct, the committee of the United States Judicial Conference authorized to provide advice concerning the Code of Judicial Conduct for United States Judges.

Under all the circumstances, it would be an act of judicial statesmanship for the District Judge to request that the litigation now be reassigned.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ORDER NO. 37
THIS DOCUMENT RELATES TO ALL CASES:

MDL Dkt. No. 732
M21-45-MP

In re IVAN F. BOESKY SECURITIES LITIGATION

88 Civ. 6209 (MP)

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

—against—

DREXEL BURNHAM LAMBERT INCORPORATED, *et al.*,

Defendants.

Opinion

Two motions are before the Court in these related actions. The first seeks recusal of the Court pursuant to 28 U.S.C. § 455 in 88 Civ. 6209 (MP) and the second seeks similar relief in MDL Dkt. No. 732; M21-45-MP as to the 13 lawsuits in those dockets. Both motions will be handled together in this Opinion and Order.

The evidentiary facts are adequately and properly detailed in the opposing papers of the Securities and Exchange Commission.

The papers on these motions evidence the following essential and decisive ultimate facts:

The transaction about which the defendants Drexel and their officers and directors complain is the all-cash contract of sale with Bain Venture Capital signed on June 29, 1988 by Moselle Pollack—Judge Pollack's wife—and others in Mrs. Pollack's family, selling their entire stockholdings in a family retail corporation, Palais Royal, Inc. of Houston, Texas. The sale was made to the wholly owned subsidiary of Bain (SHI) organized to receive the ownership of the Palais Royal stock. The closing is scheduled for October 31, 1988. No member of the controlling family will have any continuing interest either as an employee or otherwise in the company or in the purchaser. Under the agreement, Bain has the obligation to "use its best efforts to obtain the financing necessary for the consummation of the transactions . . . from a bank or banks or other institutional lenders on terms reasonably satisfactory to [Bain]." (Exh. B p. 20 annexed to motion papers)

Drexel has had no business or dealings with Palais Royal, with Mrs. Pollack, or any of the other selling stockholders. Its own internal memoranda state that its role is to act as a "consultant" to Bain, or as a "best efforts" "underwriter or placement agent" of 10-year senior subordinated notes to be issued by SHI, which represents only about one-fourth of the funding of the global merger, which Bain has undertaken in the premises. (Exhs. A, C, D).

There is no financial or business connection, or other relationship between Mrs. Pollack and Drexel. Nor, as the defendants incorrectly intimate or say, is Mrs. Pollack selling any of her stock to Drexel, nor are they buying anything from her. Admittedly there is "no privity" whatever between Mrs. Pollack and Drexel on anything to do with the transactions involved. She will receive no money from Drexel. Hers is not a Drexel-financed transaction.

The only contract of the Palais Royal stockholders in the premises is with Bain (SHI) and that is not subject to negotiation by Drexel or even by Bain (SHI). (See the contract of June 29, 1988). The selling stockholders were pointedly excluded, were expressly barred by Bain from sitting in or participating in Bain's dealings with their prospective money lenders and from knowledge of Drexel's attempted procurement of the sales

agency for the private placement of Bain's (SHI's) senior subordinated 10-year promissory notes and other loans to Bain (SHI). There is simply no reasonable basis for doubting the Court's impartiality in this case by reason of the Palais Royal stock sale; no facts, no rational basis, have been supplied.

To the array of factual data against their contentions and the utter and admitted lack of any privity between Mrs. Pollack, her stockholdings, and their sale to Bain, Drexel's lawyers retort, "so what"? (Reply Br. 6)

The defendants' second contention is even more bizarre than the first; it is that 28 U.S.C. § 453(b)(4) applies here because the outcome of the proceedings herein could be substantially affected if Mrs. Pollack were to complete her sale to Bain (SHI). Self-evidently the Commission's civil action against Drexel and others has nothing to do with the sale of Palais Royal stock by Mrs. Pollack.

The choice to accept Drexel as Bain's agent for the placement of debt securities is the unrestricted and voluntary choice to be made by Bain with which Palais Royal and its stockholders have nothing to say and no concern; indeed, as already indicated, they have been blocked by Bain from any participation in Bain's choice of agents to place Bain's securities.

On the other hand, the placement of the promissory notes of SHI and the further possible bridge loan appear to present a highly profitable business opportunity for Drexel, one which they voluntarily seek to accept.

The Commission presented proof from an outstanding expert in the field, one whose expertise was acknowledged on the record by Drexel's lawyer, who stated in his opinion:

> The transaction proposed by Bain, including the acquisition of Palais Royal for cash, is not a difficult deal to finance. Nothing about the transaction requires financing or restructuring skills unique to Drexel. . . . Drexel is not indispensable to either the completion or success of this transaction.
>
> A number of investment banking firms are capable of providing bridge financing and senior subordinated debt financing in the amounts sought by Bain and on the terms

> offered by Drexel. Absent a material adverse change in the financial markets and the economy, in my opinion this deal will be financed with or without the participation of Drexel.

The legal position of Drexel Burnham as argued to the Court is, in counsel's words:

> This court should recuse itself because my client is entitled to judgment of a court whose impartiality cannot be questioned, even though those questions would be entirely without basis in fact. In the end, of course, it is for this court, Judge Pollack, to make the determination whether this court should recuse itself from these cases involving Drexel Burnham.

The moving parties assert: "We would have been derelict and in violation of our professional obligations, both to this court and to the public, if we were to allow these litigations to proceed while these facts remained undisclosed." Thus to test themselves, they put the following hypothetical to themselves:

> What would be the public response [if this court] . . . were to determine this highly publicized enforcement action . . . in favor of Drexel Burnham and against the SEC?

And in another hypothetical they pose the further question to themselves:

> What would be the public response, the response of a reasonable person in all these circumstances if, as very likely might well arise, we were to move for the depositions of certain key witnesses, including Mr. Boesky, and this court were to grant us the right to depose Mr. Boesky over the vigorous opposition of the United States Government; would the public react unfavorably to that and feel that in some way Your Honor had not acted with complete impartiality?

The moving parties then respond to their speculations:

> We are here because we believe we are entitled not only to a fair and impartial determination of this case, but to a determination of this case which no one can question as possibly having been tainted by extraneous matter. The issue in this case is not whether this court can be impartial. The issue in this case is a basic issue of the appearance of justice and the appearance of impartiality.

The moving parties wind up their speculative hypotheses with an appropriate question suggested by a decided case: "whether a reasonable member of the public at large, aware of all the facts, might fairly question the court's impartiality."

Thus the fundamental argument for recusal is that hypothetical decisions hereafter might be made by the Judge which will be favorable to Drexel, albeit deservedly, and would be perceived by reasonable members of the public to have been made because of the sale of Palais Royal stock to Bain Venture Capital. It is suggested that Drexel would not want to bear the burden of such success. Or, on another speculation, were there to be unfavorable decisions the reasonable public perception would ascribe them to the failure of the stock sale to happen.

These perceptions concocted by the moving parties, grounded on a remote transaction, seem so far-fetched as reactions of a reasonable person, as to be ludicrous and hardly a basis for a Judge to step aside from cases and related matters which he has been administering for upwards of 15 months and hardly to be attributed to normal perceptions of reasonable persons in the light of the actual facts and circumstances herein. To follow the line of thinking of the moving parties would place in the hands of a party a basis in every case for claiming a recusal by reason of having brought factually unfounded accusations of lack of impartiality—a mischievous notion.

This court can confidently respond, unhesitatingly, that under all the actual facts and circumstances herein, it has no doubt that a reasonable person, a member of the public, would fail to perceive even the slightest doubt of the appearance of the Judge's impartiality.

In sum:

The antics of counsel in attempting to frustrate the filing of the Commission's complaint herein, are an affront to the civility which must attend the conduct of litigation. The case is as clearly related to the earlier 13 cases before the Court as the interest of my wife and her family is unrelated to the merits of this litigation.

Much valuable time and attention have been drawn away on illusory diversions. The playing field is level as it has been for the more than 20 years of service in this Court. We are interested only in the merits and due process with the issues forthwith.

Motions Denied.

So Ordered

Dated: October 17, 1988

MILTON POLLACK

Senior United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

88-3060

In re DREXEL BURNHAM LAMBERT INCORPORATED *et al.*,
Petitioners.

[Form Omitted]

ORDER

IT IS HEREBY ORDERED that the motion seeking a stay of this Court's mandate pending application for certiorari is granted for a period of 30 days from the date of this order.

/s/ J. Edward Lumbard

/s/ Richard J. Cardamone

3/7/89
Date

/s/ Lawrence W. Pierce
Circuit Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 88-3060

SDNY, Pollack 88CV6209

Filed: October 20, 1988

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 20th day of October one thousand nine hundred and eighty-eight.

Present:

HONORABLE J. EDWARD LUMBARD

HONORABLE RICHARD J. CARDAMONE

HONORABLE LAWRENCE W. PIERCE

Circuit Judges,

IN RE: DREXEL, BURNHAM LAMBERT INCORPORATED, DREXEL BURNHAM LAMBERT GROUP INCORPORATED, MICHAEL R. MILKEN, LOWELL J. MILKEN, CARY J. MAULTASCH, and PAMELA R. MONZERT,

Petitioners.

ORDER

A petition for a writ of mandamus having been filed, Upon consideration thereof, it is ORDERED that an answer to said petition shall be filed by the respondents on or before 12 noon, October 28, 1988.

FURTHER ORDERED that the Clerk shall serve a copy of this order on the district court and all parties to the action in the trial court.

FURTHER ORDERED that a stay of all proceedings in the district court is granted, sua sponte, pending the determination of the petition.

FURTHER ORDERED that the application for expedited consideration of the petition be and it hereby is granted.

/s/ J. Edward Lumbard

/s/ Richard J. Cardamone

/s/ Lawrence W. Pierce

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MDL Dkt. No. 732
M21-45-MP
88 Civ. 6209 (MP)

In re IVAN F. BOESKY SECURITIES LITIGATION

—and—

In re DREXEL BURNHAM LAMBERT INCORPORATED, *et al.*,

ex rel.

In the matter of PAUL, WEISS, RIFKIND, WHARTON & GARRISON and ARTHUR LIMAN and MARTIN FLUMENBAUM,

Respondents.

Order #35

This order pertains to the parties
plaintiff and to the respondents hereto.

Upon the annexed exhibits from which a fiduciary relationship appears to exist and has existed between the respondents and PALAIS ROYAL and its STOCKHOLDERS, and it appearing that respondents may have participated herein on the pending motions for recusal of the Court adversely to PALAIS ROYAL and its STOCKHOLDERS, WITH KNOWLEDGE, actual and imputed, of the confidential business, internal affairs and plans of Palais Royal and its stockholders and with respect to sale of their stockholdings and matters incident and related thereto; now therefore,

Let said respondents show cause before this Court in Courtroom 1305 on October 11, 1988 at 11 A.M. or as soon thereafter as counsel can be heard,

WHY an investigation and hearing should not be held to determine whether respondents are proceeding herein in breach of fiduciary duties and obligations and with professionally conflicting interests in the pending matter seeking disqualification of the Court pursuant to 28 U.S.C. § 755 in respect to the interests of Palais Royal and its stockholders; and why respondents should not be required to identify and withdraw the papers on said disqualification motion which they have drafted, filed and served herein as well as their signatures thereto; and WHY the plaintiffs and any other parties should not have such other and further relief as may be just and proper.

Dated: October 10, 1988

/s/ Milton Pollack
Senior United States District Judge

[LETTERHEAD OF PAUL, WEISS, RIFKIND, WHARTON & GARRISON]

April 6, 1987

Mr. Bernard Fuchs
Palais Royal of Houston, Inc.
P.O. Box 35167
Houston, Texas 77235

Dear Bernie:

This letter will confirm our agreement with the recommendation contained in the letter to you from Deloitte, Haskins & Sells dated January 23, 1987 that Palais Royal, which has elected federal S corporation status, not elect New York State S corporation status, and that Palais Royal subject itself to New York State and City corporate franchise taxes. We understand that Palais Royal would incur minimal New York State and City franchise tax liabilities as a result of doing so. As you know, New York City does not recognize S corporation status.

We also confirm that we are not aware of any material adverse tax effects on the shareholders of Palais Royal who are New York City residents which would be caused by a decision of Palais Royal to elect federal, but not New York State, S status. Of course, the New York shareholders will have to maintain one set of tax records for federal purposes and a second set for New York purposes.

In order to become subject to corporate franchise tax in New York State and City, Palais Royal must bring itself within the taxing jurisdiction of the State and City. One way for the corporation to do so would be for it to lease an office in New York City for the convenience of its buyers when they come here. It is unclear whether Palais Royal would be required to qualify as a foreign corporation in New York if it were to take such a step.

I hope this letter addresses your concerns. Please call me if you have any questions.

Sincerely,

/s/ ALFRED D. YOUNGWOOD
Alfred D. Youngwood

cc: Mrs. Milton Pollack
Mr. George Asch

[LETTERHEAD OF PAUL, WEISS, RIFKIND, WHARTON & GARRISON]

June 1, 1987

Personal and Confidential

Mr. George Asch
Ashton Hosiery Company, Inc.
1140 Avenue of the Americas
19th Floor
New York, New York 10036

Dear George:

I enclose two copies of a memo to you with respect to new wills for you and Cissy and a trust for Elizabeth. I also enclose another copy of our letter to Bernie relating to New York State and Subchapter S.

With best regards,

Sincerely,

/s/ ALFRED
Alfred D. Youngwood

Enclosure

EXPRESS MAIL

[LETTERHEAD OF PAUL, WEISS, RIFKIND, WHARTON & GARRISON]

June 18, 1987

FEDERAL EXPRESS

Mr. Bernard Fuchs
Palais Royal of Houston, Inc.
10201 South Main
Houston, Texas 77025

Palais Royal of Houston, Inc.

Dear Bernie:

In accordance with my discussions with George Asch, I enclose a draft General Partnership Agreement between Palais Royal and Ashton Hosiery together with a draft lease.

We are looking into whether Palais Royal should be a limited partner and I will give you a call in the next day or so on that issue.

With best regards,

Sincerely,

/s/ ALFRED
Alfred D. Youngwood

ADY:ccs
Enclosures

cc: Mr. George Asch

[LETTERHEAD OF PAUL, WEISS, RIFKIND, WHARTON & GARRISON]

June 18, 1987

Mr. George Asch
Ashton Hosiery Company, Inc.
1140 Avenue of the Americas
19th Floor
New York, New York 10036

Dear George:

I enclose for your review a draft Partnership Agreement between Ashton and Palais Royale forming PRA Associates as a New York general partnership and a draft lease between PRA Associates and Ashton. As my associate Jonathan Fredman indicated to you, it is important that this sublease not be prohibited by your basic lease. If you would like us to take a look at Ashton's basic lease to confirm this, please let us know.

Please give me a call after you have had a chance to review the enclosed.

With best regards.

Sincerely,

/s/ ALFRED
Alfred D. Youngwood

Enclosure

BY HAND

[LETTERHEAD OF PAUL, WEISS, RIFKIND, WHARTON & GARRISON]

June 25, 1987

Mr. Bernard Fuchs
Palais Royal of Houston, Inc.
10201 South Main
Houston, Texas 77025

Dear Bernie:

I enclose four copies of the Partnership Agreement of PRA Associates and four copies of a Lease between PRA Associates and Ashton, each of which George has already executed on behalf of Ashton, as well as a marked copy of the Partnership Agreement indicating on page 4 the changes we discussed from the draft I previously sent to you.

If all is in order, please execute four copies of the Partnership Agreement and four copies of the Lease on behalf of Palais Royal and return to me two copies of each of the Partnership Agreement and the lease. I will keep one fully executed copy in our files and I will pass one fully executed copy to George when he returns from the Far East.

If you have any questions, please call me.

With best regards,

Sincerely,

Alfred D. Youngwood

Enclosures
FEDERAL EXPRESS

cc: Mr. George Asch (without enclosure)

[LETTERHEAD OF PAUL, WEISS, RIFKIND, WHARTON & GARRISON]

June 18, 1987

Mr. George Asch
Ashton Hosiery Company, Inc.
1140 Avenue of the Americas
19th Floor
New York, New York 10036

Dear George:

I enclose for your review a draft Partnership Agreement between Ashton and Palais Royale forming PRA Associates as a New York general partnership and a draft lease between PRA Associates and Ashton. As my associate Jonathan Fredman indicated to you, it is important that this sublease not be prohibited by your basic lease. If you would like us to take a look at Ashton's basic lease to confirm this, please let us know.

Please give me a call after you have had a chance to review the enclosed.

With best regards,

Sincerely,

/s/ ALFRED
Alfred D. Youngwood

Enclosure

BY HAND

[LETTERHEAD OF PALAIS ROYAL]

July 10, 1987

Mr. Alfred D. Youngwood
Paul, Weiss, Rifkind, Wharton & Garrison
1285 Avenue of the Americas
New York, New York 10019

Dear Alfred:

I am enclosing two fully executed copies of the partnership agreement of PRA Associates and two copies of the lease between PRA Associates and Ashton.

I assume that a copy of each will be forwarded by you to Geroge Asch.

Thank you for your help.

Sincerely,

/s/ BERNIE
Bernard Fuchs

BF/am
enclosures

[LETTERHEAD OF PAUL, WEISS, RIFKIND, WHARTON & GARRISON]

November 30, 1987

Mr. Bernard Fuchs
Palais Royal of Houston, Inc.
10201 South Main
Houston, Texas 77025

Dear Bernie:

I enclose our bill for professional services and disbursements with respect to various New York State tax matters and certain collateral matters with respect to your Federal Subchapter S election.

With best regards,

Sincerely,

/s/ ALFRED
Alfred D. Youngwood

Enclosure

cc: Mr. George Asch

[LETTERHEAD OF PAUL, WEISS, RIFKIND, WHARTON & GARRISON]

To professional services rendered through November 30, 1987.	$12,500.00
Disbursements, Lexis and other charges	1,163.68
	$13,663.68

* * *

13,663.68	.00	13,663.68
12/10/87	136629	
12/10/87	136629	*13,663.68

PAUL, WEISS, RIFKIND, WHARTON & GARRISON
1255 AVE OF THE AMERICAS
NEW YORK, NY
10019

September 16, 1988

MEMORANDUM

To George Asch From Stuart Kaperst

cc: Alfred D. Youngwood

Subject New York State Residency

Set forth below is a discussion of New York residency status that was included in a memorandum recently prepared for another client. The discussion includes a brief description of the provisions of the New York Tax Law and regulations promulgated thereunder regarding residency status and sets forth a list of factors that affect the determination of an individual's domicile and residence for New York tax purposes. The discussion is a general overview of the rules for determinations of New York residency status and does not include any analysis of your daughter's specific situation.

Residency

A determination of an individual's New York State residency status depends upon whether such individual is domiciled in New York. Any individual domiciled in New York is a resident of New York for tax purposes unless such individual (i) does not maintain any permanent place of abode in New York,[1] (ii) maintains a permanent place of abode outside New York and (iii) is present in New York[2] for no more than 30 days of such taxable year.[3] An individual who is not domiciled in New York will be taxed as a resident of New York only if he (i) maintains a

1 Any dwelling used in New York, including any dwelling provided by an employer, could be treated as a permanent place of abode.

2 An individual is present in New York on a calendar day for this purpose if such individual is physically present for any part of such day other than solely related to the beginning or continuation of travel to a point outside of New York. 20 N.Y.C.R.R. § 102.2(c).

3 New York Tax Law § 605(a)(1).

permanent place of abode in New York and (ii) is present in New York for more than 183 days of the taxable year.[4]

Domicile

Domicile is defined for New York State tax purposes as "the place which an individual intends to be his permanent home—the place to which he intends to return whenever he may be absent."[5] An individual can have only one domicile; the domicile of an individual with more than one home will depend upon which is regarded as his permanent home. The determination of where an individual *intends* to make his *permanent* home is made by reference to all of the surrounding facts and circumstances, including the taxpayer's declarations of intent and actual conduct.

Regulations promulgated by the New York State Tax Commission provide that a "domicile once established continues until the person in question moves to a new location with the bona fide intention of making his fixed and permanent home there" and further provide that the "burden is on any person asserting a change of domicile to show that the necessary intention existed."[6] Moreover, the New York courts have held that the evidence for any such change of domicile must be "clear and convincing."[7] The factors that have been taken into consideration in administrative and judicial proceedings in New York in determinations of domiciliary status include the following:

1. Character of new residence, including whether owned or leased;
2. Sale or retention of New York abode;
3. Voter registration locale;
4. Driver's license locale;
5. Automobile registration;

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4 *Id.*

5 20 N.Y.C.R.R. § 102.2(d)(1).

6 20 N.Y.C.R.R. § 102.2(d)(2).

7 *Bodfish v. Gallman*, 378 N.Y.S.2d 138, 141 (3d Dept. 1976).

6. Mailing address and telephone listings;
7. Residency of family members;
8. Locale of enrollment of children in school;
9. Frequency of presence in New York;
10. Financial holdings, including banks accounts, investment accounts and business interests;
11. Execution of will in new locale; and
12. Locale of religious and social affiliations.[8]

In the event that you are determined not to be domiciled in New York, you will be taxed as a New York resident only if you maintain a permanent place of abode in New York and are present in New York for more than 183 days of the taxable year. As indicated above, however, even if you do not maintain an apartment in New York, any dwelling that you use while in New York, any dwelling that you use while in New York may satisfy the "permanent place of abode" requirement. Consequently, if you are a California domiciliary, your New York residency determination will likely depend upon demonstrating that you are not physically present in New York for 183 calendar days of the taxable year. In this connection, you should be aware that proof of physical presence frequently becomes burdensome and difficult to determine during an audit. Many individuals who expect that they may be required to demonstrate the extent of their physical presence in New York keep a moderately detailed diary for this purpose. In addition to its possible use during an audit, such a diary helps to ensure that the 183-day limit is not inadvertently exceeded.

S.C.K.

8 New York Tax Service, Matthew Bender, Vol. 1, § 3.61 (1987).

[LETTERHEAD OF GEORGE ASCH]

October 11, 1988

MEMORANDUM

Phyllis Asch and George Asch met with Alfred Youngwood on June 2, 1988 at 5 p.m. in the offices of Paul, Weiss, Rifkind, Wharton and Garrison to discuss the possible sale of Palais Royal of Houston, the family business, and the tax implications on New York shareholders. We had had talks about this on prior occasions. At that meeting, the former connection with Goldman Sachs and present affiliation of investment banking firm were discussed, though specifics of the current sale were not detailed.

It was further decided to postpone a revision of the put agreement with Palais Royal that the Asch family enjoyed since the family intended to execute the sale contract the next week.

The memorandum of September 16, 1988 to George Asch from those attorneys was for our consideration in connection with our discussion with the attorneys of anticipated proceeds to the stockholders from the pending sale of Palais Royal stock.

The relationship of Mrs. Moselle Pollack and all stockholders to Judge Pollack was fully known to members of Paul, Weiss, Rifkind, Wharton and Garrison.

/s/ _____

APPENDIX G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re IVAN G. BOESKY SECURITIES LITIGATION

—and—

In re DREXEL BURNHAM LAMBERT INCORPORATED, *et al.*,

ex rel

In the matter of PAUL, WEISS, RIFKIND, WHARTON & GARRISON and ARTHUR LIMAN and MARTIN FLUMENBAUM,

Respondents.

October 11, 1988
11:00 a.m.

Before:

HON. MILTON POLLACK,

District Judge

APPEARANCES

SECURITIES AND EXCHANGE COMMISSION
THOMAS C. NEWKIRK
BARRY R. GOLDSMITH
ROBERT B. BLACKBURN
Of counsel

PAUL WEISS RIFKIND WHARTON & GARRISON
Attorney for Michael Milken
ARTHUR LIMAN
JAY TOPKIS
MARTIN FLUMENBAUM
ALFRED D. YOUNGWOOD
Of counsel

CADWALADER WICKERSHAM & TAFT
Attorney for Arden Way Plaintiffs
GEORGE D. REYCRAFT
PAMELA R. CHEPIGA
DEBRA BROWN
Of counsel

WOLF POPPER ROSS WOLF & JONES
Attorney for Class Action Plaintiffs
STANLEY NEMSER
Of counsel

BERGER & MONTAGUE
Attorney for Class Action Plaintiffs

DANIEL BERGER
Of counsel

(Case called)

THE COURT: I have received this morning an affidavit of Mr. Alfred D. Youngwood and an affidavit of Arthur L. Liman and an affidavit of Martin Flumenbaum and it is now admitted in these papers that Mr. Flumenbaum and Mr. Liman knew of the representation of Palais Royal and its stockholders before serving and filing further papers in this case and concluded to remain silent and apparently took charge of the recusal motion with the papers emanating from their office. I believe they are charged with knowledge concerning the conflicting representation since 1987 and particularly June 2, 1988 and September 16, 1988, the details of which came to my attention only this past weekend.

I've decided to refer the conduct of the parties in this case for disciplinary resolution, if required, to the Chief Judge, since it is unrelated to the interests of the defendants in the matter on the claims of the Securities and Exchange Commission in litigation and even to the motions for recusal by other counsel which will be heard at two o'clock. And I will hear no more about this motion.

The clerk is directed to forward the papers to Judge Brieant accordingly. I don't have the originals of these affidavits but if they've been filed you can get them from the file. If they haven't been filed they should be.

This court is now closed.

MR. TOPKIS: Do I understand that we are instructed to be silent?

THE COURT: I am giving you no instructions. The matter is referred for all purposes to Chief Judge Brieant. You heard what I had to say. It has no relation whatever to the recusal motion by other counsel and it has no relationship to any issue in the case.

MR. TOPKIS: We expect to be before your Honor at two o'clock this afternoon.

THE COURT: That's your business, not mine.

(Proceedings adjourned)

APPENDIX H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

88 Civ. 6209 (MP)

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

DREXEL BURNHAM LAMBERT INCORPORATED, *et al.*,

Defendants.

September 13, 1988
11:30 a.m.

Before:

HON. MILTON POLLACK,

District Judge

APPEARANCES

THOMAS C. NEWKIRK,
ROBERT B. BLACKBURN,
GARY LYNCH,
BARRY GOLDSMITH,
Attorneys for the SEC

CURTIS MALLET-PROVOST COLT & MOSLE
Attorneys for defendants
BY: PETER FLEMING,
of Counsel

CAHILL, GORDON & REINDEL
Attorneys for defendants
BY: THOMAS F. CURNIN,
of Counsel.

* * *

THE COURT: . . . .

Now, all I know about Bain is that they are the financing arm of a financial consulting company up there in Boston also called Bain something and the only relationship that the stockholders have had has been a contract with Bain who was going to buy them out after they got through with their investigation of the finances and this, that and the other thing and they had arranged to talk to Bernie Fuchs, who is the present president.

Bernie Fuchs' history was 18 or 20 years ago he came in as an assistant vice-president or a vice-president and when Mrs. Pollack's husband died, her first husband, she was named the president and continued in that capacity I think until about five or six or seven years ago—I don't know the dates—at which time, through the inexorable passage of time, I won't tell you how old she is but she is not young, she turned the mantle over to Bernie Fuchs and he has been the president.

What I understand is that Bain then made some kind of an arrangement with Bernie Fuchs that he was to continue and be named as chairman of the board of the venture that they were buying and from that time on, I just learned this yesterday, the senior vice-president in charge of finances, Marvin Kaplan, and the senior vice-president in charge of operations, Rodney Margolies, two sons-in-law of Moselle Pollack were excluded by express request from any discussions whatever that Bain was having with Fuchs about what they were going to do, how they were going to do it and who they were going to borrow money from in order to carry out this purchase and what was going to happen and it hit me like a ton of bricks when I heard Peter say that Drexel Burnham was involved in this thing in some way.

Certainly no stockholder and none of the family knew what they were going to do, apparently, after this contract was made between the stockholders and a subsidiary of Bain. Some name that begins with an S, I don't know what the name is, that subsidiary was organized to make the arrangement and the payment that was going to be made by Bain and Citibank Venture Capital. Those two were putting up the money and that's what I believe the stockholders knew of. Period. End of that.

Who they approached, how many they approached, what the status is of those approaches and so on is completely unknown to me and I was tempted to call up Bernie Fuchs and find out what was going on and I said, wait a minute, what am I doing in this thing trying to get information that I don't have now which Rodney and Marvin bore out— . . . .

I am very much disturbed that this thing comes up this way with two people for whom I have the regard as I do of these people because I don't think that they are run-of-the-mill people who in representation of clients commit professional improprieties, but I sure don't like the way it was presented to me with the comment that Mrs. Pollack was going to get millions from Drexel.

Actually, she doesn't get her hands on any part of it because of her estate and I will say I don't get any part of it and I will tell you another thing out of school. I get nothing from her regardless of who survives. I don't intend to have it. I had nothing to do with the business. That's the story.

* * *

MR. FLEMING: It was in that connection that Tom and I placed a conference call at 20 minutes of 5 on Saturday afternoon when you were watching the Yankee game.

THE COURT: Did you record it, Peter?

MR. FLEMING: I did not, your Honor. I wish I had in view of what you said because I did not make that representation.

THE COURT: If you had, I would have held you in contempt.

MR. FLEMING: The second point—

I am surprised you would ask me that question. Judge, actually—

THE COURT: I just want to know how far this goes in the representation of a client.

MR. FLEMING: I am surprised you would ask me the question but, putting that aside, the failure to advise the Commission before we called the court is my fault and it was not a thinking decision but an unthinking decision.

Sunday morning I was in my office, actually reading the Commission's complaint and analyzing it, and I called Gary at his number I guess about 9:30 or 10 o'clock—

MR. LYNCH: It was just before 9 a.m.

MR. FLEMING: —Sunday morning and advised him rather briefly of what this was about. That Judge Pollack had advised us that he would meet with us on Tuesday and a date to be fixed probably on Monday or Tuesday.

THE COURT: Let me ask you this question: Did you foresee this as something that might result in my being favorable toward or partial toward Drexel? Is that why you called me?

MR. FLEMING: I'll tell you exactly why I called you, Judge.

THE COURT: Just answer me that question. I want to know. Did you think I was going to favor Drexel because of this cockamamie story that you were working on?

MR. FLEMING: I gave no thought to that issue whatsoever, nor have I given any thought to that issue. What I did give serious thought to and that is why I was persuaded by Judge Rifkind and I am convinced this was in Judge Rifkind's mind, I wanted your Honor to know this as soon as possible because I didn't know when, if ever—

THE COURT: Know what?

MR. FLEMING: To know what Tom will relate to you. The effect on your Honor is something I had given no consideration other than your Honor be advised of the facts.

THE COURT: They are here now and whatever you have to say affects them. I don't see how it affects your client except that—unless you were trying to imply, as I understood you were implying, that I was in Drexel's camp somehow or other and they didn't know about it.

MR. FLEMING: I am talking about appearances. I am not analyzing the situation.

THE COURT: You were attacking me professionally.

MR. FLEMING: No, we were not. You know me from a long while and I have never enjoyed arguing with any court and particularly with your Honor.

We are not attacking you professionally. We felt a professional obligation and Judge Rifkind confirmed that we should advise you of these facts. That is not an attack. That is information.

If I could start, your Honor, because I am flatly concerned about something else. This really has to do with what started

this in the beginning and that is the relation of this case to this court by the Commission.

THE COURT: I am not going to let you get into that in this discussion. That is a separate subject entirely.

MR. FLEMING: Can I ask just two questions?

THE COURT: I read the newspapers about that.

MR. FLEMING: I wasn't there.

THE COURT: I don't want to have this matter clouded in any way by anything to do with the first attempt to nudge me out of the case. Forget it, please. I know why I asked for this meeting and it has to do with whether I am in any way anybody's man in this case.

MR. FLEMING: Your Honor, I want to respond to what you said about nudging you out of this case. The question in this case to me is the way in which the system in the Southern District of New York is administered and that is the only question.

THE COURT: You take that up with the Bar Association and with the rest of the court.

MR. FLEMING: Very good. I would like, if I could, to ask one question with regard to the filling out of the civil cover sheet on the SEC filing.

THE COURT: That is another subject that is not before us now in this closed session.

MR. FLEMING: Very good.

THE COURT: It is a subject you can argue out publicly if you want to.

MR. CURNIN: Judge, let me add a footnote if I can to what Peter said and—

THE COURT: It was your office that raised a fuss initially sometime back about somebody who had been making approaches to me on the other side of the fence and we straightened that out and got an understanding that that was not what was intended but that was the effect of it.

Here we are number two with the same kind of a thing.

* * *

THE COURT: Are you saying to me that for discovery purposes these 14 or 15 or 16 cases, plus this one, should not be consolidated?

MR. FLEMING: I am saying the following, your Honor—

THE COURT: Is that what you are saying?

MR. FLEMING: I am saying the following: I am saying that where the form says, fill in only if you intend to move for consolidation and you do not intend to move for consolidation, then I don't think you can sign that form and I think you would criticize me if I signed the form.

THE COURT: Come on. Come on. That's a small reed to hang onto. Anyway, go ahead, Tom, and finish up.

MR. CURNIN: That was the point in placing the call and—

THE COURT: About whether they intended to consolidate?

MR. CURNIN: No. Judge, let me tell you something: The question of consolidation or not consolidating, is it a related case or isn't it a related case, had nothing to do with Peter's and my discussion as to whether or not we would inform you and when we would inform you of this fact. Believe it or not, Judge Pollack—

THE COURT: Did you get a copy of the contract before you called me?

MR. CURNIN: No, Judge, because I didn't think it was necessary.

THE COURT: Are you for real?

MR. CURNIN: Yes, Judge, I am for real. What I thought was important and what Peter thought was important—

THE COURT: You mean you don't know at this point as to who the stockholders contracted with?

MR. CURNIN: I know what information—

THE COURT: Other than what I told you this morning?

MR. CURNIN: Judge, I am going to give you all the information and give the SEC all the information I have.

THE COURT: Look, Tom, don't avoid me. Are you saying you don't know what the contract says and with whom the stockholders contracted?

MR. CURNIN: I believe that I have a general understanding of who the parties are and what the obligation is. I do not know all the detail of it and I conveyed to your Honor and Peter and we jointly conveyed to your Honor whatever information we had and we believe that the information we had was sufficient

and important enough that you should be informed of it right away.

THE COURT: I want to tell you something. If you fellows had put that in an affidavit and come up on a Rule 11, you would have gotten whacked. You didn't make any investigation at all to find out what you were talking about before you approached a judge who was handling a lawsuit?

MR. FLEMING: That's not true.

MR. CURNIN: This is the background in which this was going on, consider this: We knew—

THE COURT: Your client is upset because it says something about the Commission and the Commission says something about your client, but you are implicating me. That's where I come in.

MR. FLEMING: Judge, let me ask you a question. Would you have preferred that we not tell you?

THE COURT: I would have preferred that you called them on the telephone and said, look, we think there is something about the partiality or impartiality of the Judge. Let's talk to him. That's what I think Peter Fleming would have done if he were still in the U.S. Attorney's office.

MR. FLEMING: I would never have raised that question with Gary in a telephone call. What I should have done, as your Honor says, I should have called Gary on Saturday instead of Sunday. I will concede that. That was not a thinking decision on my part.

I am saying would your Honor prefer we not provide this information to you in the circumstances of this case?

THE COURT: Certainly I want the information, but I don't want it ex parte.

MR. FLEMING: I have already said that was my mistake. It was not a thinking mistake.

* * *

MR. LYNCH: There were telephone calls between counsel who were present in Washington and I know there were telephone conversations between Mr. Curnin and John Steck.

MR. CURNIN: I asked him if he could tell me he would not file and he said no—

MR. FLEMING: Let Tom finish. The situation on Wednesday, Judge, you've got an institution which does literally millions and millions of dollars worth a day. This investigation and the authorization, the recommendation, all of the newspapers, we say—

THE COURT: That is like the cases that Peter Fleming used to prosecute all over the newspapers. Remember Kelly and Imp?

MR. FLEMING: Never leaked, your Honor.

THE COURT: Okay.

MR. FLEMING: So we are representing this corporation with all of the credit situations that exist and we are told, we are not going to tell you when we are going to file, we are not going to tell you anything.

Tom said he thought Labor Day because the summer was over and he called down there and they would not tell us a thing, whether they would file or not. They can do that, but we have a right to have people covering the courthouse so that our client can be informed so he can take whatever steps he has to take.

THE COURT: You are not telling them your strategy, either.

MR. FLEMING: We tried to.

THE COURT: You didn't tell them about calling me up. That is the first piece of strategy.

MR. FLEMING: That was not a piece of strategy. If you can't accept that, then you can't accept my word any longer.

THE COURT: It is rankling me awfully hard because I think you moved on inadequate information as to where Moselle Pollack and her family stand.

MR. FLEMING: Judge, very simply, would you have liked to have read that in the newspaper without us having called you?

THE COURT: It could only get in the newspaper if you put it there.

MR. FLEMING: If I could have sworn to that, I wouldn't have called you.

MR. CURNIN: Peter's question is the question that was in our minds Friday night. What would Judge Pollack—

THE COURT: I am not sitting in judgement on you or on Peter. I have told you that I know you both and I know you

both favorably and Peter has explained he thought it was a mistake.

Now the question is what do you want to do about the substance, never mind the mistake?

MR. FLEMING: Your Honor, we have not looked—we have been doing a lot of things, undertaken an extensive look at the issue of recusal. We have not talked to our client.

THE COURT: I can tell you right now you can forget the issue of recusal and that is one that I would write a very strong opinion about under the circumstances.

MR. FLEMING: If there is a determination by any of the defendants that that motion should be made, it will be made. The reason for us coming, your Honor, is because, one, to explain to you in detail as you requested of what the facts were as we understood them so you would know them and, two, because I do believe that your Honor has to consider the question of whether, as I read a case, a reasonable man would be concerned, there would be an appearance question if this thing became public.

THE COURT: Appearance of what about whom?

MR. FLEMING: The lack of impartiality one way or the other. That is the issue under the recusal statute.

THE COURT: I am telling you right now that you can notify all of your constituents and colleagues and associates that I will want whatever they have to say under oath and submitted publicly.

MR. FLEMING: That is how a motion is made, isn't it?

THE COURT: I intend to exercise whatever rights I have to sanction anybody who on the basis of insufficient information and failure to investigate and concealment of anything that might or should have been said—

MR. FLEMING: You can swear me now, Judge, if you want to talk about concealment. I will testify to that.

THE COURT: I am not talking about you. I am talking about your associates, the people that you are going to talk to about whether I should be recused.

MR. FLEMING: I am talking about co-counsel who we deliberately did not ask to come today to keep this meeting small.

MR. CURRAN: That is the reason we did it, Judge.

THE COURT: I don't want this thing to get into a standoff between the judge and the counsel because I have no feeling one way or the other for either party in the case. I don't know what the facts are. I read the newspapers. I understand that newspapers don't represent facts. They represent allegations.

MR. FLEMING: Judge, I will be very direct. I don't believe you should take this case. I will give you three reasons.

THE COURT: I have taken the case and I don't intend to give it up except for some impropriety on my part which I do not visualize exists in this matter.

MR. FLEMING: May I ask your Honor, then, whether this case will be consolidated for trial with the other cases?

THE COURT: You can ask that at the proper time.

MR. FLEMING: That's not fair.

THE COURT: When that matter is before the court.

MR. FLEMING: That is not fair.

THE COURT: That matter involves everybody in the case, all 13 or 14 cases, and is going to have to be submitted on the basis of appropriate affidavits and argument. I haven't the slightest idea. All I can tell you is that what I see in the affidavit of relatedness that this is what we the judges of this court consider a related matter at that point.

Now, you start talking consolidated, I don't know what you have in mind about unconsolidated proceedings. You are apparently saying that it should be unconsolidated, but you will argue that out in the proper forum at the proper time. It has nothing at all to do with the stockholders of Palais Royal.

MR. FLEMING: I agree with that.

THE COURT: That is the only purpose of the meeting, Peter.

MR. FLEMING: Judge, you know this question is important, it is important to the way in which justice is administered in the district. The court quite properly in my view—and I am a defense counsel—did away with the three judge choice that the U.S. Attorney was giving people who pleaded guilty. I was so happy to see the judges do away with that.

I think the related case system has been abused here—

THE COURT: You won't be deprived of the fullest opportunity that you want to talk about anything to do with a procedural aspect of the case on notice to everybody affected.

MR. FLEMING: Fine.

* * *

APPENDIX I

28 U.S.C. § 455

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.